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Recommended Citation

David M. English, The UPC and the New Durable Powers, 27 *Real Property, Probate and Trust Journal* 333 (1992).

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THE UPC AND THE NEW DURABLE POWERS

David M. English*

Editors' Synopsis: This article thoroughly explores the escalation of interest in durable powers of attorney, with particular emphasis on health care powers and advance directives. The author focuses on durable power legislation influenced by the Uniform Probate Code and health care power and advance directive statutes enacted in response to recent decisions dealing with the withholding or withdrawal of life-sustaining treatment.

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I. INTRODUCTION

In *Cruzan v. Director, Missouri Department of Health*,¹ the Supreme Court held that states can constitutionally prohibit the withholding or withdrawal of life-sustaining treatment from patients who fail to provide clear and convincing evidence of their express wishes.² The Court did not, however, explicitly recognize a constitutional right to die.³ Despite the Court's narrow holding and its lack of guidance for future decisions,⁴ *Cruzan* does make one important contribution: because it emphasizes the importance of patient intention,⁵ it has led to a renewed interest in advanced directives, including living wills and durable powers of attorney.⁶ Estate

¹ 110 S. Ct. 2841 (1990).

² The Court's statement of its holding is even narrower: "In sum, we conclude that a state may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state." *Id.* at 2854.

³ The Court recognized a constitutional right to refuse treatment. *Id.* at 2851. As Justice Scalia carefully pointed out, however, the Court did not explicitly hold that there is a constitutional right to refuse life-sustaining treatment. He concluded "that the Constitution has nothing to say about the subject" of life-sustaining treatment. *Id.* at 2863 (Scalia, J., concurring).

⁴ The *Cruzan* decision leaves unanswered the following questions, among others: Under which circumstances may a state totally prohibit the withholding or withdrawing of life-sustaining treatment? May artificial nutrition and hydration be treated differently than other forms of medical care? Are the decisions of a person whom the patient has selected, such as an agent under a durable power of attorney, constitutionally protected?

⁵ If anything is clear about *Cruzan*, it is that the state is not constitutionally required to honor the family's best guess as to the patient's intentions. *See id.* at 2855 ("But we do not think that the Due Process Clause requires the state to repose judgment on these matters with anyone but the patient herself.").

⁶ *See, e.g.,* N.Y. TIMES, June 26, 1990, at A19 (containing a guide to preparing a living will); Ellen Goodman, *Headed for Missouri? Don't Leave Home Without a Living Will*, ARGUS LEADER, June 30, 1990, at 8A (recommending living wills and durable powers of attorney in response to *Cruzan*); Diane Katz, *Interest in "Living Wills" Soar*, ARGUS LEADER, July 1, 1990, at 3A (reporting that the Society for the Right to Die added six workers to handle the deluge of post-*Cruzan* inquiries); *Making Sure Your Wishes are Honored*, U.S. NEWS & WORLD REP., July 9, 1990, at 24 (advocating the execution of both a living will and a durable power of attorney with health care provisions); NAT'L L.J., July 9, 1990, at 24 (Professor Meisel of the

planners must now gear up to respond.

Gearing up will require knowledge of pertinent state legislation, much of which has been enacted within the past few years. Since 1988, living will statutes have been enacted in seven jurisdictions, thereby raising to forty-six the number of jurisdictions with living will or natural death acts.⁷ More significantly, since 1988, more than thirty jurisdictions have enacted statutes authorizing durable powers of attorney for health care, bringing the total number of jurisdictions with such legislation to forty-one.⁸

University of Pittsburgh, in commenting on *Cruzan*, states that "I think the practical message to doctors will be: We have to be a lot more careful and circumspect and shouldn't remove life support without a living will.").

Further interest will be generated by the requirement, effective December 1, 1991, that patients receive written information regarding advance directives upon admission to a Medicare- or Medicaid-reimbursed hospital, skilled nursing facility, home health agency, hospice program, or prepaid organization. See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 4206, 104 Stat. 1388, 1388-115 to -117 (codified in scattered sections of 42 U.S.C.); *id.* § 4751, 104 Stat. at 1388-204 to -206 (codified in scattered sections of 42 U.S.C.).

⁷ Kentucky Living Will Act, ch. 122, 1990 Ky. Acts 332 (codified at KY. REV. STAT. ANN. §§ 311.622-.644 (Michie/Bobbs-Merrill Supp. 1990)); Adult Health Care Decisions Act, ch. 3, 1989 Minn. Laws 8 (codified at MINN. STAT. ANN. §§ 145B.01-.17 (West Supp. 1991)); New Jersey Advance Directives for Health Care Act, ch. 201, 1991 N.J. Sess. Law Serv. 800 (West) (codified at N.J. STAT. ANN. §§ 26:2H-53 to -78 (West Supp. 1992)); Act approved Apr. 10, 1989, ch. 309, 1989 N.D. Laws 858 (codified as amended at N.D. CENT. CODE §§ 23-06.4-01 to -14 (Supp. 1991)); Modified Uniform Rights of the Terminally Ill Act, Am. Substitute S.B.1, 1991 Ohio Legis. Serv. 159, 166-76 (Anderson) (codified at OHIO REV. CODE ANN. § 2133.01-.15 (Anderson Supp. 1991)); Rights of the Terminally Ill Act, chs. 166 & 308, 1992 R.I. Pub. Laws ___, ___ (codified at R.I. GEN. LAWS §§ 23-4.11-1 to -13 (Supp. 1991)); Act approved Mar. 14, 1991, ch. 273, 1991 S.D. Laws 440 (codified at S.D. CODIFIED LAW ANN. §§ 34-12D-1 to -22 (Supp. 1992)). A complete list of the other living will statutes can be found in ALAN MEISEL, *THE RIGHT TO DIE* 359 (1989). As of December 31, 1991, living will statutes or, as they are sometimes termed, natural death acts, had yet to be enacted in Massachusetts, Michigan, Nebraska, New York, and Pennsylvania.

⁸ For a list of the statutes and their types, see *infra* notes 118-30 and accompanying text. This list is current as of December 31, 1991. The number will probably be higher by the time this article is published.

Durable power of attorney for health care statutes were not enacted in a vacuum, but rather reflect the fundamental changes that are occurring in all aspects of durable powers. What began little more than twenty years ago as a simple concept has recently become quite complex. Statutory forms have proliferated,⁹ and the general durable power statutes are giving way to special purpose statutes, most notably health care and financial accounts statutes.¹⁰

The new complexity is not without purpose. Changes have been made to overcome third party reluctance to honor powers and to make durable powers widely available to the general public. Yet, those positive steps are not without costs. Uniformity, an important goal for both property and health powers, is now only a mirage. A client who moves to another state may no longer assume that the power executed in the previous home state will be valid and effective in the new home state.¹¹ Furthermore, because statutes have become so complex, counsel must carefully advise a client as to the form's proper execution and preparation. This assumes, of course, that the principal will seek legal advice, which is less likely today than formerly because of the proliferation of do-it-yourself forms.

This article examines the current legislative landscape in durable powers. It begins with general durable powers, focusing on the states' reception of the durable power provisions of the Uniform Probate Code (UPC). Examined next are the new durable powers, which include the statutory short-form, the durable power bank account, and, most importantly, the durable power for health care. With the exception of the health care powers, emphasis is placed on 1988, 1989, and 1990 developments. For the health care powers, this article includes a discussion of legislation enacted through 1991.

⁹ For a discussion of the statutory short-forms directed primarily at property management, see *infra* text accompanying notes 51-79. For a discussion of the statutory form health care powers, see *infra* text accompanying notes 124-266.

¹⁰ For a discussion of what is here termed the "durable power bank account," see *infra* text accompanying notes 80-111.

¹¹ For a discussion of this problem as it relates to the statutory health care forms, see *infra* notes 255-66 and accompanying text.

II. THE UPC AND ITS INFLUENCE

At common law a power of attorney was revoked by the principal's incapacity.¹² That common-law rule has now been abrogated by statute in all fifty states and the District of Columbia.¹³ If the instrument so authorizes, the authority of the agent¹⁴ may now survive the principal's incapacity.¹⁵ This abrupt shift to a durable power concept is due to the wide acceptance of the durable power provisions of the UPC. First proposed in 1969, the durable power provisions of the UPC, or its identical twin, the Uniform Durable Power of Attorney Act (UDPAA), are now in effect in twenty-five states and the District of Columbia.¹⁶ These two acts have also served as models for the enactments in many of the other states.¹⁷

The UPC and UDPAA offer the principal several options. A principal may create a nondurable power, which terminates upon receipt of actual knowledge of the principal's death or incapacity. A principal may create a standard durable power, which survives

¹² RESTATEMENT (SECOND) OF AGENCY § 122 (1957).

¹³ For a list of what are termed general durable power of attorney statutes, see *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841, 2858 n.3 (1990) (O'Connor, J., concurring).

¹⁴ For ease of expression, "agent" is used throughout instead of the more cumbersome "attorney in fact."

¹⁵ The general durable power statutes also eliminated the civil law variant in effect in some states that the power survived incapacity only for the purpose of protecting the agent and others until they were in possession of actual knowledge of incapacity. See William F. Fratcher, *Persons Under Disability*, in *UNIFORM PROBATE CODE PRACTICE MANUAL* § 14.37, at 249 (Robert Wright ed., 1972).

¹⁶ The 26 jurisdictions that have adopted the UPC, including its durable power provisions, or that have instead adopted the UDPAA, are listed in *UNIF. DURABLE POWER OF ATTORNEY ACT*, 8A U.L.A. 96 (Supp. 1992).

¹⁷ The Joint Editorial Board of the Uniform Probate Code concluded in 1983 that more than 30 states had enacted UPC-inspired durable power statutes. *UNIF. PROBATE CODE* §§ 5-501 to -505 prefatory note, 8 U.L.A. 512 (1983). One commentator, however, has listed 42 states with statutes modeled after or containing language echoing the UPC. Mark Fowler, Note, *Appointing an Agent to Make Medical Treatment Choices*, 84 COLUM. L. REV. 985, 1012 n.175 (1984).

incapacity and terminates upon receipt of actual knowledge of the principal's death. Or a principal may create a springing power, under which the authority of the agent springs into effect upon incapacity and, like the standard power, terminates upon actual knowledge of the principal's death.¹⁸

As originally enacted, the UPC durable power provisions failed to anticipate a number of potential problems. The 1969 UPC did not explicitly provide that a principal could nominate a guardian or conservator, a common and sound estate planning practice.¹⁹ This defect was remedied in 1979.²⁰ However, the statute, both as originally approved and as later amended, did not address another

¹⁸ See UNIF. PROBATE CODE § 5-501, 8 U.L.A. 272 (Supp. 1991); *id.* § 5-504, 8 U.L.A. 516 (1983). Citations to the identical UDPAA have generally been omitted throughout. This section of the article focuses on legislative change and not on a detailed description of the UPC nor on the many planning questions that may arise in connection with general durable powers. For such a discussion, see John J. Lombard, Jr., *Asset Management Under a Durable Power of Attorney--The Ideal Solution to Guardianships and Conservatorships*, 9 PROB. NOTES 189 (1983); John J. Lombard, Jr., *Planning for Disability: Durable Powers, Standby Trusts and Preserving Eligibility for Governmental Benefits*, 20 INST. ON EST. PLAN. ¶¶ 1700, 1701-1709 (1986).

¹⁹ The most widely applicable reasons for nominating the agent as guardian or conservator are to discourage others from applying for appointment and to assure the continued authority of the agent should an appointment become necessary. See, e.g., UNIF. PROBATE CODE § 5-503 cmt., 8 U.L.A. 515 (1983). Also, in a number of jurisdictions, a nomination in a power may secure the waiver of the guardian's or conservator's bond. See, e.g., CONN. GEN. STAT. ANN. § 45a-645(c) (West Supp. 1992); S.D. CODIFIED LAWS ANN. § 30-27-25 (1984). In addition, in Ohio a nomination in a power may override a restriction against nonresidents acting as guardians. OHIO REV. CODE ANN. § 2109.21(C) (Anderson Supp. 1991).

²⁰ UPC § 5-503(b) authorizes a principal to nominate a guardian or conservator and requires the court to make the appointment in accordance with the most recent nomination unless the nominee is disqualified or good cause is shown. UNIF. PROBATE CODE § 5-503(b), 8 U.L.A. 514-15 (1983). Other 1979 changes included amendments relating to the protection of third parties, amendments relating to the protection of an agent for actions taken without actual knowledge of the principal's death, a reorganization that expanded the number of sections from two to five, and the addition of the UDPAA as a free-standing act. See UNIF. DURABLE POWER OF ATTORNEY ACT prefatory note, 8A U.L.A. 275-77 (1983); UNIF. PROBATE CODE § 5-501 prefatory note, 8 U.L.A. 511-13 (1983).

possible defect: the contention that a power becomes invalid due to lapse of time.²¹ That hole was plugged in 1984, and then again in 1987, by amendments providing that the power remains exercisable despite the lapse of time since its execution.²² Given the ingrained hostility to durable powers among many third parties, however, one may question whether the lapse of time amendments will be effective.²³ Furthermore, even if they are effective, the UPC still does not address a host of other justifications offered for the refusal to accept a power, including doubts as to the validity of the power's creation, the propriety of an agent's action, the scope of an agent's authority, and the timeliness of an agent's authority under a springing power.²⁴

²¹ The lapse of time or "staleness" problem may be traceable to the common-law tenet that the authority of an agent under an agency which does not specify a termination date expires after a reasonable time. See RESTATEMENT (SECOND) OF AGENCY § 105 (1957). In responding to the staleness problem, many banks, insurance companies, title companies, mutual funds firms, and brokerage firms established arbitrary cut-offs, such as six months or one year from execution, after which they would not accept a durable power. See, e.g., Robert Whitman & Linda M. Terry, *How Do Insurance Companies Regard the Durable Power of Attorney?*, TR. & EST., June 1979, at 50; *Durable Power of Attorney*, PROB. & PROP., Fall 1983, at 31. There appears to have been little improvement in recent years. See, e.g., James N. Zartman, *Planning for Disability*, 15 PROB. NOTES 11, 17 n.17 (1989) (one major brokerage firm refuses to accept powers; another has "national policy" that it will accept only powers no more than five years old).

²² UPC § 5-501, the definition of durable power of attorney, was amended in 1984 to provide that lapse of time does not affect the exercise of an agent's authority unless the power states a time of termination. UNIF. PROBATE CODE § 5-501, 8 U.L.A. 272 (Supp. 1991). UPC § 5-502, a provision relating to the effectiveness of the agent's authority, was amended in 1987 to add a similar provision. *Id.* § 5-502, 8 U.L.A. 273.

²³ James Zartman has suggested that third parties frequently reject durable powers due to ignorance of the fact that the law has been changed to permit a power to survive incapacity. See Zartman, *supra* note 21, at 17 (stating that "[w]ith the advent of durable powers, this concern of third parties should have been laid to rest. But old, thoroughly-ingrained habits die hard. And rules of thumb about powers of attorney that have become 'standard operating procedure' in large organizations are hard to change." (footnote omitted)).

²⁴ UPC § 5-505 authorizes third parties to seek protection by requesting that the agent provide an affidavit that the power has not been revoked or terminated due to death or, in the case of a nondurable power, terminated due to incapacity. UNIF.

In addition, recent UPC amendments have not contributed to the goal that gave the UPC its name: the enactment of *uniform* legislation. There are today four different uniform acts in effect among the twenty-six jurisdictions that have officially adopted the UDPAA or the UPC, including its durable power provisions: the 1969, 1979, 1984, and 1987 versions.²⁵ These versions are in addition to the many variations in particular states that are not based on the official text, including provisions covering such matters as consent for health care, the inclusion of an optional statutory form, a requirement that the power be executed in the same manner as a will, and procedures for court oversight of agents' actions.²⁶

Since 1988, the influence of the UPC has continued. Oklahoma joined the official list of adopting jurisdictions in 1988,²⁷ and Hawaii

PROBATE CODE § 5-505, 8 U.L.A. 517-18 (1983). No protective procedure is provided, however, for third parties who have the concerns listed in the text.

²⁵ The official list, with citations, is located in UNIF. DURABLE POWER OF ATTORNEY ACT, 8A U.L.A. 96 (Supp. 1992). Of the 26 jurisdictions listed, the statutes of Minnesota, Missouri, and South Carolina vary so greatly from the official text that no attempt at classification was made. Of the remaining 23 jurisdictions, the 1969 version is currently in force in seven: Arizona, Colorado, Kentucky, Maine, Michigan, New Mexico, and Utah; the 1979 version is currently in force in 11; Alabama, California, Delaware, Hawaii, Idaho, Kansas, Massachusetts, Pennsylvania, Tennessee, West Virginia, and Wisconsin; the 1984 version is currently in force in three: the District of Columbia, Nebraska, and Oklahoma; and Montana and North Dakota have adopted the 1987 version.

²⁶ See, e.g., COLO. REV. STAT. ANN. § 15-14-501(1) (West Supp. 1991) (health care consent); ME. REV. STAT. ANN. tit. 18-A, § 5-501 (West Supp. 1991) (health care consent); MINN. STAT. ANN. § 523.23 (West 1990) (optional statutory form); MO. ANN. STAT. § 404.727 (Vernon 1990) (court oversight); N.M. STAT. ANN. § 45-5-501 (Michie 1989) (optional statutory form); S.C. CODE ANN. § 62-5-501 (Law. Co-op. Supp. 1991) (will execution formalities, recording, and health care consent).

²⁷ Act approved July 1, 1988, ch. 293, §§ 1-7, 1988 Okla. Sess. Laws 1453, 1453-54 (codified at OKLA. STAT. ANN. tit. 58, §§ 1071-1077 (West Supp. 1992)). Powers executed prior to November 1, 1988 continue to be governed by the previous statute, which was based on the Model Special Power of Attorney for Small Property Interests Act, a precursor of the UPC that was not widely enacted. Oklahoma's version of the Model Act is codified at OKLA. STAT. ANN. tit. 58, §§ 1051-1063 (West Supp. 1992). For a discussion of the Model Act, see Fowler, *supra* note 17, at 1016-22.

made the list in 1989.²⁸ Among the nonadopting states, Texas²⁹ and Virginia³⁰ added the lapse of time concept, New York and Ohio gave statutory recognition to the springing power,³¹ and Florida removed its bar against nonrelative agents.³²

²⁸ Act effective June 8, 1989, Act 270, 1989 Haw. Sess. Laws 594 (codified at HAW. REV. STAT. §§ 551D-1 to -7 (Supp. 1991)). Former § 560:5-501 of the Hawaii Revised Statutes was identical to § 5-501 of the UPC as originally approved in 1969, but former § 560:5-502, unlike UPC § 5-502 as originally approved, did not delay the termination of the power until the agent or third party possessed actual knowledge of the terminating event. Compare UNIF. PROBATE CODE §§ 5-501 to -502 (1969), reprinted in 2 UNIFORM PROBATE CODE PRACTICE MANUAL 493, 493-95 (2d ed. 1977) (requiring actual knowledge by the agent for termination) with HAW. REV. STAT. 560:5-501 to -502 (1988) (repealed 1989) (power of attorney terminates at disability or death of principal).

²⁹ Act effective Aug. 28, 1989, ch. 404, § 1, 1989 Tex. Sess. Law Serv. 1550, 1550-51 (Vernon) (amending TEX. PROB. CODE ANN. § 36A (West Supp. 1992)). Chapter 404 also amends § 36A to require that a durable power, other than a power for medical care, be witnessed by at least two persons and recorded in the county of the principal's residence. In addition, Chapter 404 amends § 36A to require that if a power contains an indemnity and hold harmless clause, a third party must transact business with the agent in the same manner as the third party would have transacted business with the principal. However, no penalties are provided for a failure to comply, and the provision does not absolve third parties from potential liability. For alternative solutions to the problem of third-party refusal, see *infra* notes 45-50 and accompanying text.

³⁰ Act of Mar. 29, 1988, ch. 343, 1988 Va. Acts 414 (amending VA. CODE ANN. § 11-9.2 (Michie 1989)). This amendment, in a sense, brings Virginia full circle. Virginia was a pioneer in the use of durable powers, and its durable power statute was the model for the UPC. See UNIF. PROBATE CODE §§ 5-501 to -505 prefatory note, 8 U.L.A. 511-12 (1983).

³¹ Act effective July 1, 1988, ch. 210, 1988 N.Y. Laws 2159 (codified at N.Y. GEN. OBLIG. LAW § 5-1602 (McKinney 1989)); Act of Nov. 18, 1988, Am. Sub. S.B. 228, 1988 Ohio Laws 990, 1005-06 (amending OHIO REV. CODE ANN. § 1337.09 (Anderson Supp. 1989)). The New York and Ohio provisions are broader than UPC § 5-501. Not only do they permit the agent's authority to spring into effect upon incapacity, but they also provide that the authority may become effective at a specified time or upon any other contingency. For a similar broadly defined springing power, see ILL. ANN. STAT. ch. 110 1/2, para. 802-4(a) (Smith-Hurd Supp. 1992).

³² Act effective Oct. 1, 1990, ch. 232, § 24, 1990 Fla. Laws 1729, 1749-50 (amending FLA. STAT. ANN. § 709.08 (West Supp. 1991)). Although a nonrelative may now act as agent, notice of the power's execution must be mailed to the principal's spouse, or if none, to the principal's adult natural or adopted children. *Id.*

However, the adopting states were notable for their continued failure to update their statutes. For example, instead of enacting the current version of the UPC's durable power provisions, Hawaii enacted the 1979 version and Oklahoma enacted the 1984 version.³³ Only Montana and North Dakota updated their statutes by adding the 1987 amendment.³⁴

The adopting states also continued their drift away from the official text. Indiana repealed its version of the uniform act,³⁵ and California added a provision clarifying that a principal may specify the procedures for determining incapacity.³⁶ New Mexico added an optional statutory form,³⁷ and South Carolina amended its statute to authorize the granting of health care authority.³⁸

The biggest shift away from the UPC occurred in Missouri, which discarded its existing statute, enacted a new statute unlike any other, and still managed to retain its listing as a uniform durable

³³ See *supra* note 25.

³⁴ Act approved Apr. 20, 1989, ch. 582, § 24, 1989 Mont. Laws 1433, 1444-45 (amending MONT. CODE ANN. § 72-5-501 (1991)); Act approved Apr. 13, 1989, ch. 401, §§ 11-12, 1989 N.D. Laws 1109, 1114 (amending N.D. CENT. CODE §§ 30.1-30-01 to -02 (Supp. 1991)). For a description of the 1987 amendment, see *supra* note 22.

³⁵ Act effective July 1, 1991, Pub. L. 149, § 6, 1991 Ind. Acts 2258, 2309 (repealing IND. CODE ANN. §§ 30-2-11-1 to -7 (Burns 1989)). The new Indiana durable power of attorney statute, which is not based on the uniform act, is codified at IND. CODE ANN. § 30-5-1-1 to -10-4 (Burns Supp. 1992). For a brief summary of some of its provisions relating to health care, see *infra* note 121.

³⁶ Act approved Sept. 17, 1990, ch. 986, § 6, 1990 Cal. Legis. Serv. 3603, 3615-16 (West) (adding CAL. CIV. CODE § 2514 (West Supp. 1992)). The new statute provides that a springing power may be made dependent upon an event other than incapacity, that the principal may designate one or more persons to have conclusive authority to determine whether the triggering event has occurred, and that third parties may rely on such determinations. *Id.*

³⁷ Act approved Apr. 5, 1989, ch. 252, § 29, 1989 N.M. Laws 1448, 1496-1502 (amending N.M. STAT. ANN. § 45-5-501 (Michie 1989)). For a discussion of the New Mexico and other statutory short-forms, see *infra* text accompanying notes 51-79.

³⁸ See *infra* note 121 and accompanying text.

power state.³⁹ The Missouri statute looks to guardianship law for guidance.⁴⁰ However, it also prescribes standards of conduct similar to those required of a trustee⁴¹ and expands Missouri's accounting procedure.⁴² Furthermore, it permits a principal to give the agent general powers and then defines the scope of that authority in detail.⁴³ Yet it carefully requires that specific authority be granted

³⁹ Durable Power of Attorney Law of Missouri, H.B. 145, sec. A, §§ 1-16, 1989 Mo. Laws 942, 964-74 (codified as amended at MO. ANN. STAT. §§ 404.700-.735 (Vernon 1990 & Supp. 1992). The act repealed the previous durable power provisions, which were codified at MO. ANN. STAT. §§ 486.550-.595 (Vernon 1987) (repealed 1989). For a reference to Missouri's continued status, see UNIF. DURABLE POWER OF ATTORNEY ACT general statutory note, 8A U.L.A. 89 (Supp. 1991). For a detailed discussion of the Missouri act, see Leo E. Eickhoff, Jr., *New Durable Power Law and Custodial Trust Act Amendments*, 45 J. MO. B. 329 (1989).

⁴⁰ Persons who would be ineligible to act as the principal's guardian or conservator are ineligible to act as agents and, if appointed, are subject to removal. See MO. ANN. STAT. § 404.707 (Vernon 1990). The primary effect of the new requirement is to disqualify as agents the owners and operators of health care facilities, unless related to the principal. See *id.* § 475.055.2 (Vernon Supp. 1992) (guardian and conservator qualifications). The disqualification of health care and residential care providers, operators, and employees is a common feature of the recent statutory form durable power for health care enactments. See *infra* text accompanying notes 200-10.

⁴¹ An agent is required to act in good faith and in the principal's best interest. MO. ANN. STAT. § 404.710.5 (Vernon Supp. 1992). An agent may not commingle the principal's assets with the agent's own. *Id.* § 404.712 (Vernon 1990). An agent has a duty to avoid conflicts of interest, to proceed as a prudent person, and to keep in regular contact with the principal. *Id.* § 404.714. An agent may delegate authority but is not discharged from responsibility for the authorities delegated. *Id.* § 404.723.1.

⁴² The principal may petition the court for an accounting. If the principal is incapacitated, the petition may be filed by a legal representative, by an adult family member, or by any other interested person. *Id.* § 404.727.1. The court may ratify transactions, prohibit transactions, terminate the power, remove the agent, or issue any other appropriate orders. *Id.* § 404.727.5. The prior statute only required an accounting following the appointment of a conservator or, in the event of the principal's death, the appointment of a personal representative. See *id.* § 486.585.1 (Vernon 1987) (repealed 1989).

⁴³ By merely stating in the power that an agent is given general powers, the principal grants the agent all powers over the principal's estate and person which an adult nondisabled person can delegate to an agent. *Id.* § 404.710.2 (Vernon Supp. 1992). Examples of such powers, all concerning financial matters, are also

before an agent may engage in such matters as making gifts, funding a trust, disclaiming interests in property, or nominating a guardian or conservator.⁴⁴

The Missouri act's most important contribution, however, may be the sweeping protections granted to third parties, protections that, unlike the UPC, systematically undermine the excuses for refusing to honor a power.⁴⁵ A third party need not inquire into, among other things, the validity of a power's creation,⁴⁶ the scope of an agent's authority,⁴⁷ the propriety of an agent's actions,⁴⁸ or the authority of an agent under a springing power.⁴⁹ The act fails, however, to impose liability upon third parties who refuse to honor a power. This omission is significant. Forcing reliance by imposing liability may be the only way to catch the attention of third parties and to make the

enumerated in the statute. *See id.* § 404.710.4.

⁴⁴ *Id.* § 404.710.6. The other powers that require specific authorization include creating or revoking a trust, changing survivorship interests or beneficiaries, consenting to an autopsy, or making anatomical gifts and other health care decisions. *Id.* However, a principal may never delegate the authority to make or revoke a will. *Id.* § 404.710.7.

⁴⁵ For a discussion of the UPC's approach to third party protection, *see supra* notes 21-24 and accompanying text.

⁴⁶ A third party without actual knowledge has no duty to inquire into the validity of an agent's designation, the capacity of the principal at the time of execution, or the possible subjection of the principal to undue influence or fraud. MO. ANN. STAT. § 404.719.1 (Vernon 1990). Similarly, Illinois waives the duty to inquire into the validity of the execution and into the principal's capacity at the time of execution, but does not specifically address undue influence or fraud. *See* ILL. ANN. STAT. ch. 110 1/2, para. 802-8 (Smith-Hurd Supp. 1992).

⁴⁷ The scope of an agent's authority is now of less concern because a third party may deal freely with the agent whether or not the proposed act, transaction, or decision is authorized in the power. MO. ANN. STAT. § 404.710.8 (Vernon Supp. 1992).

⁴⁸ The act provides that a third party has no duty to inquire into "[t]he propriety of any act of the attorney in fact or successor in the principal's behalf." *Id.* § 404.719.1(4) (Vernon 1990). Illinois likewise provides that a third party may presume that the actions of an agent conform to the standards prescribed by its statute, one of which requires that an agent exercise due care for the principal's benefit. *See* ILL. ANN. STAT. ch. 110 1/2, paras. 802-7, -8 (Smith-Hurd Supp. 1992).

⁴⁹ A third party has no duty to inquire whether an event making effective an agent's authority has occurred. MO. ANN. STAT. § 404.719.1(5) (Vernon 1990).

durable power a fully effective device.⁵⁰

III. THE STATUTORY SHORT-FORM

A statutory short-form power of attorney is just as its name describes. The form itself is set out in the statute. It is also short. Instead of spelling out the powers of the agent in detail, a statutory short-form contains a series of blanket phrases such as "real estate transactions" or "stock and bond transactions." The phrases are defined not in the form but elsewhere in the statute. Pursuant to the form's directions, the principal delegates powers to the agent merely by initialing or checking a box next to a phrase, or, in other variants, by simply not striking a phrase.⁵¹ The statutory definitions of the phrases that the principal selects are thereby incorporated by reference into the power.

⁵⁰ "The most important factor for an effective agency régime (apart from durability, itself) is reasonable protection for third parties who rely in good faith on the agent's authority, coupled with sanctions for arbitrary or unreasonable refusal to deal with an authorized agent." Zartman, *supra* note 21, at 17. For an example of such a provision, see ILL. ANN. STAT. ch. 110 1/2, para. 802-8 (Smith-Hurd Supp. 1992).

⁵¹ See ALASKA STAT. § 13.26.332 (Supp. 1991) (agent granted all listed powers except to extent lines are drawn through particular categories and boxes next to those categories are initialed); CONN. GEN. STAT. ANN. § 1-43(a) (West Supp. 1992) (agent granted all listed powers except to extent particular categories are struck and boxes next to those categories are initialed); ILL. ANN. STAT. ch. 110 1/2, para. 803-3 (Smith-Hurd Supp. 1992) (agent granted all listed powers except to extent particular categories are struck); MINN. STAT. ANN. § 523.23 (West 1990) (agent granted powers that the principal has either checked or "x-ed"); NEB. REV. STAT. § 49-1522 (1988) (agent granted powers that principal has marked); N.M. STAT. ANN. § 45-5-501(B) (Michie 1989) (agent granted powers that principal has initialed); N.Y. GEN. OBLIG. LAW § 5-1501(1) (McKinney 1989) (agent granted all listed powers except to extent particular categories are struck and boxes next to those categories are initialed); N.C. GEN. STAT. § 32A-1 (1991) (agent granted powers that principal has initialed); UNIF. STATUTORY FORM POWER OF ATTORNEY ACT § 1, 8A U.L.A. 329-31 (Supp. 1992) (agent granted powers that principal has initialed).

The statutory short-form is not a new concept; it was first enacted in New York in 1948⁵² and duplicated in Connecticut in 1965.⁵³ It has, however, taken off within the last several years. There were four additions between 1983 and 1987,⁵⁴ and Alaska, Nebraska, and New Mexico were added to the list during 1988 and 1989.⁵⁵ Furthermore, in 1988 the Uniform Law Commissioners approved the Uniform Statutory Form Power of Attorney Act,⁵⁶ which California adopted in 1990, although not without significant substantive change.⁵⁷ This activity is in addition to the many recent

⁵² Act approved Mar. 23, 1948, ch. 422, 1948 N.Y. Laws 764 (recodified as amended at N.Y. GEN. OBLIG. LAW §§ 5-1501 to -1504 (McKinney 1989 & Supp. 1992)).

⁵³ Connecticut Statutory Short Form Power of Attorney Act, Pub. Act 573, 1965 Conn. Pub. Acts 784 (codified as amended at CONN. GEN. STAT. ANN. §§ 1-42 to -56 (West 1988 & Supp. 1992)). For a discussion of a 1990 amendment, see *infra* note 68 and accompanying text.

⁵⁴ Act approved July 18, 1984, ch. 602, 1984 Cal. Stat. 2294 (repealed 1990); Statutory Short Form Power of Attorney for Property Law, Pub. Act 85-701, Art. III, 1987 Ill. Laws 2930, 2933-40 (codified as amended at ILL. ANN. STAT. ch. 110 1/2, paras. 803-1 to -4 (Smith-Hurd Supp. 1992)); Act approved Apr. 26, 1984, ch. 603, §§ 25-27, 1984 Minn. Laws 1405, 1411-35 (codified as amended at MINN. STAT. ANN. §§ 523.23-.25 (West 1990)); Act of June 27, 1983, ch. 626, 1983 N.C. Sess. Laws 563, 563-67 (codified as amended at N.C. GEN. STAT. §§ 32A-1 to -3 (1991)). For the current California statute, see *infra* note 57 and accompanying text.

⁵⁵ Act approved June 6, 1988, ch. 109, 1988 Alaska Sess. Laws (codified at ALASKA STAT. §§ 13.26.332-.356 (Supp. 1991)); Nebraska Short Form Act, Leg. B. 475, 1988 Neb. Laws 419 (codified at NEB. REV. STAT. §§ 49-1501 to -1561 (1988)); Act approved Apr. 5, 1989, ch. 252, § 29, 1989 N.M. Laws 1448, 1496-1502 (amending N.M. STAT. ANN. § 45-5-501 (Michie 1989)).

⁵⁶ The Commissioners acknowledged that their act was drawn in part from the short-form statutes in effect in California, Illinois, Minnesota, and New York. UNIF. STATUTORY FORM POWER OF ATTORNEY ACT prefatory note, 8A U.L.A. 328 (Supp. 1992).

⁵⁷ Act approved Sept. 17, 1990, ch. 986, §§ 1-3, 1990 Cal. Legis. Serv. 3603, 3604-14 (West) (adding CAL. CIV. CODE §§ 2475-2499.5 (West Supp. 1992), amending CAL. CIV. CODE § 2450, and repealing §§ 2451-2473 (West Supp. 1990)). Substantive differences between the uniform act and its California version include the modification of the form to permit the designation of co-agents, and the addition of a provision clarifying that an agent lacks authority to modify a trust unless the power of attorney expressly so provides. See CAL. CIV. CODE §§ 2475, 2499.5 (West Supp. 1992); UNIF. STATUTORY FORM POWER OF ATTORNEY ACT § 1, 8A U.L.A. 329-31 (Supp. 1992).

statutory form enactments directed exclusively at health care matters, which are dealt with later in this article.⁵⁸

The short-form statutes were enacted with good intentions. First, because the form is simple and standard, individuals who might not otherwise seek legal help may be more inclined to execute a power of attorney. Second, the availability of an officially sanctioned form will reduce the reluctance of third parties to honor powers of attorney.⁵⁹ Finally, the addition of a statutory form purports to help satisfy the growing interest in durable powers.⁶⁰

⁵⁸ See *infra* text accompanying notes 124-266.

⁵⁹ The Commissioners note that their form will be supported by the express authority of the enacting states. They hope that the form will become both familiar and readily accepted. UNIF. STATUTORY FORM POWER OF ATTORNEY ACT prefatory note, 8A U.L.A. 328 (Supp. 1992).

The declared purpose of the Illinois Power of Attorney Act, which added both property and health care forms, is, among other things, to empower an agent to act throughout the principal's lifetime and, by protecting third parties, to make certain that third parties will honor the agent's authority at all times. ILL. ANN. STAT. ch. 110 1/2, para. 802-1 (Smith-Hurd Supp. 1992). For a detailed discussion of the Illinois act, see James N. Zartman, *The New Illinois Power of Attorney Act*, 76 ILL. B.J. 546 (1988); James N. Zartman, *Illinois Power of Attorney Act*, 13 S. ILL. U.L.J. 1 (1988).

⁶⁰ The Commissioners note that the new act includes a durable power of attorney option because of the growing interest in durable powers and the fact that the use of these powers is recommended by other uniform acts. UNIF. STATUTORY FORM POWER OF ATTORNEY ACT prefatory note, 8 U.L.A. 329 (Supp. 1992). The new uniform act, however, does not include a comprehensive durable power form. Despite the availability of a springing power option under UPC § 5-501, springing powers are not mentioned in the form. Several of the other forms also fail to mention either springing or nondurable powers. See, e.g., CONN. GEN. STAT. ANN. § 1-43 (West 1988 & Supp. 1992) (no mention of durable power, springing power, or nondurable power; power is nondurable unless form is modified); MINN. STAT. ANN. § 523.23 (West 1990) (no mention of springing power); N.M. STAT. ANN. § 45-5-501(B) (Michie 1989) (no mention of nondurable power); N.Y. GEN. OBLIG. LAW § 5-1501(1) (McKinney 1989) (no mention of durable power, springing power, or nondurable power; power is nondurable unless form is modified). The durable power concept is omitted from the Connecticut and New York forms because both predate the UPC, which was approved in 1969. See *supra* notes 52-53 and accompanying text.

It is too early to tell whether the statutory forms will produce the envisioned panacea. But one thing is certain: several of the forms fail to mention a number of standard options often included in a durable power of attorney. Perhaps this omission was made deliberately to provide a simple form for the lay public. On the other hand, a simple form can lead to complex problems. For instance, the failure to name a co-agent or successor agent can force the appointment of a guardian or conservator if the office of agent becomes vacant. Yet, a person who slavishly follows the format of the recent Nebraska and uniform act forms would be unaware of the possibility of naming multiple or successor agents.⁶¹ The recently enacted Alaska and New Mexico forms, on the other hand, clearly indicate those possibilities.⁶² Assuming a principal has surmounted that hurdle and has modified the form to provide for alternates, occasions may still arise in which the appointment of a guardian or conservator may be necessary, such as when a third party refuses to

⁶¹ The uniform act form provides, " I _____ (insert your name and address) appoint _____ (insert the name and address of the person appointed) as my agent (attorney-in-fact)" UNIF. STATUTORY FORM POWER OF ATTORNEY ACT § 1(a), 8A U.L.A. 329-31 (Supp. 1992). The Nebraska form is similar but a bit more elaborate in its designation of "the lawful and true Agent and attorney-in-fact for Principal." NEB. REV. STAT. § 49-1522 (1988). Neither form mentions successor agents. Because there is no mention of multiple agents, neither form reaches the question of whether multiple agents may act independently or must instead act jointly.

⁶² The Alaska form solves the single versus multiple agent question through the simple expediency of adding the phrases "agent or agents" and "attorney(s)-in-fact." ALASKA STAT. § 13.26.332 (Supp. 1991). The New Mexico form provides for the appointment of "attorney(s)-in-fact." N.M. STAT. ANN. § 45-5-501(B) (Michie 1989). In addition, both forms provide for the appointment of successor agents and require the principal to elect whether multiple agents must act jointly or may act individually. ALASKA STAT. §§ 13.26.332, -.335 (Supp. 1991); N.M. STAT. ANN. § 45-5-501(B) (Michie 1989).

None of the earlier forms provide for the appointment of both multiple and successor agents. The forms in Connecticut, Minnesota, and New York provide for the appointment of multiple agents but not successor agents; the Illinois form provides for the appointment of successor agents but not multiple agents; and the North Carolina form provides for neither multiple nor successor agents. CONN. GEN. STAT. ANN. § 1-43(a) (West Supp. 1992); ILL. ANN. STAT. ch. 110 1/2, para. 803-3 (Smith-Hurd Supp. 1992); MINN. STAT. ANN. § 523.23 (West 1990); N.Y. GEN. OBLIG. LAW § 5-1501(1)(a) (McKinney 1989); N.C. GEN. STAT. § 32A-1 (1991).

honor the power.⁶³ Of the recent forms, only Alaska makes provision for the nominating of a guardian or conservator.⁶⁴

Furthermore, the menu of powers from which a principal may select is not necessarily comprehensive. Despite the growing interest in durable powers of attorney for the principal's health care, Nebraska authorizes the agent to make health care decisions for the principal's relatives, but not for the principal.⁶⁵ The Alaska and New Mexico forms, though, deal exclusively with the principal's health care,⁶⁶ including, in the case of New Mexico, the withdrawal or withholding of life-sustaining treatment.⁶⁷ With the exception of

⁶³ For a list of some of the reasons given by third parties for a refusal to honor a power, see *supra* text accompanying note 24. Other reasons for the nomination of a guardian or conservator are discussed *supra* note 19.

⁶⁴ ALASKA STAT. § 13.26.335 (Supp. 1991). The Illinois form also authorizes the nomination of a guardian. ILL. ANN. STAT. ch. 110 1/2, para. 803-3 (Smith-Hurd Supp. 1992).

⁶⁵ Nebraska, under its category, "General Power for Domestic and Personal Concerns," authorizes the agent "to consent to or permit any dental, medical, or surgical operation or treatment or other mental or physical analysis, examination, observation, procedure, test, or treatment." NEB. REV. STAT. § 49-1549 (1988). That authority appears, however, as one of a series of powers that relate to "any domestic or personal need, requirement, or want of any child, dependent, friend, parent, relative, spouse, or other person." *Id.*

⁶⁶ Alaska specifically empowers the principal to authorize the agent to handle "health care services." ALASKA STAT. § 13.26.332 (Supp. 1991). The definition of health care services provides that an agent may "consent or refuse to consent to medical care," receive and disclose information, "grant releases," "consent or refuse to consent to" psychiatric care, and "arrange for care . . . [and] lodging." *Id.* § 13.26.344(*l*). The agent, however, is not authorized to unilaterally authorize the withholding or withdrawal of life-sustaining treatment, but may enforce a living will. *Id.* Consent to voluntary commitment in a mental health facility, electric shock, psychosurgery, sterilization, or abortion is prohibited. *Id.*

⁶⁷ A principal may authorize an agent to make decisions regarding medical treatment and nursing home care, to make "decisions regarding lifesaving and life prolonging" treatment, and to make gifts to the "principal's spouse for the purpose of qualifying . . . for governmental medical assistance." N.M. STAT. ANN. § 45-5-501(B) (Michie 1989).

Connecticut,⁶⁸ the other statutory forms omit the topic. The drafters of the uniform act deliberately omitted mention of health care because they viewed it as a topic best left for separate legislation.⁶⁹ Of all the states that have enacted statutory short-forms, only California, Illinois, New York, and North Carolina have enacted such separate legislation.⁷⁰

Even if a principal has successfully navigated through the form and has made the appropriate modifications,⁷¹ a quality product is not assured. A final assessment will depend on the quality of the statutory definitions that detail the agent's powers.⁷² Alaska's

⁶⁸ Connecticut, in 1990, amended its form to provide that a principal may authorize an agent to make "health care decisions." CONN. GEN. STAT. ANN. § 1-43 (West Supp. 1992). The agent's authority to make health care decisions commences upon a determination by the attending physician that the principal is unable to evaluate information effectively or to communicate health care decisions rationally or effectively. The authority, however, does not extend to decisions to withdraw life-support, nutrition or hydration, or care designed for physical comfort. *Id.* § 1-54a.

⁶⁹ The Commissioners concluded that health care matters were best left to separate legislation "[s]ince they involve intensely controversial personal as well as economic considerations." UNIF. STATUTORY FORM POWER OF ATTORNEY ACT prefatory note, 8A U.L.A. 328 (Supp. 1992).

⁷⁰ For a detailed discussion of the statutory form health care powers in those and other jurisdictions, see *infra* text accompanying notes 124-266.

⁷¹ With the exception of Minnesota, all of the statutory short-forms permit the principal to add powers or to make other modifications. The Minnesota form expressly disallows the insertion of modifications, and the statute requires that the form and its wording be duplicated exactly. See MINN. STAT. ANN. § 523.23 (West 1990) (form and statute).

⁷² All of the statutory forms contain a standard list of property-related powers, which are traceable to the New York statute, the first short-form act. The following are the New York statutory powers:

- (A) real estate transactions;
- (B) chattel and goods transactions;
- (C) bond, share and commodity transactions;
- (D) banking transactions;
- (E) business operating transactions;
- (F) insurance transactions;
- (G) estate transactions;
- (H) claims and litigation;
- (I) personal relationships and affairs;

definitions are understandable, at least to an attorney,⁷³ as are the uniform act's.⁷⁴ New Mexico's definitions are much easier to analyze for one important reason: they do not exist. The New Mexico legislature simply added a short statutory form but neglected to enact the statutory definitions.⁷⁵ Nebraska, on the other hand, went to the other extreme: total obfuscation. To save space, each definition incorporates by reference a variety of so-called "specific authorities," which are defined elsewhere in the statute.⁷⁶ The

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- (J) benefits from military service;
 - (K) records, reports and statements;
 - (L) full and unqualified authority to my attorney(s)-in-fact to delegate any or all of the foregoing powers to any person or persons whom my attorney(s)-in-fact shall select;
 - (M) all other matters.

N.Y. GEN. OBLIG. LAW § 5-1501(1) (McKinney 1989). The meaning of the powers is then spelled out in § 5-1502. *Id.* at § 5-1502 (McKinney 1989 & Supp. 1992).

⁷³ The powers enumerated in the Alaska form and the supporting statutory definitions closely follow New York's, *supra* note 72, except that the Alaska form also permits the principal to authorize the agent to handle "health care services." See ALASKA STAT. § 13.26.332 (Supp. 1991) (form); *id.* § 13.26.344 (definitions). For the definition of health care services, see *supra* note 66.

⁷⁴ The uniform act's enumerated powers and definitions are similar to New York's, *supra* note 72, with two differences. The uniform act creates separate categories for tax and retirement matters and, to save space, adds a provision entitled "Construction of Powers Generally." This general provision covers such matters as the power to sue and defend, to hire and reimburse other agents, and to file documents that the agent considers desirable to safeguard the principal's interest. See UNIF. STATUTORY FORM POWER OF ATTORNEY ACT § 3, 8A U.L.A. 332 (Supp. 1992). Tax and retirement matters are also listed as separate categories in the Illinois form. See ILL. ANN. STAT. ch. 110 1/2, para. 803-3 (Smith-Hurd Supp. 1992).

⁷⁵ Except for health care, the powers listed in the New Mexico form do not significantly vary from those in New York, *supra* note 72. For a list of New Mexico's health-related powers, see *supra* note 67. For the other powers, see N.M. STAT. ANN. § 45-5-501(B) (Michie 1989).

⁷⁶ The confusion does not start with the definitions but with the form. A principal must first determine whether the power is to be a durable power of attorney and a contingent durable power of attorney, a durable power of attorney and a present durable power of attorney, or a nondurable power of attorney, all of which are undefined in the form. See NEB. REV. STAT. § 49-1522 (1988).

The principal must then decide which powers to grant. An agent may be granted plenary power, plenary power subject to limitations, or one or more of 12 general powers. The general powers largely track the New York list except for the

Nebraska statute does contain one redeeming feature, however; it includes a form for revoking a short-form power.⁷⁷

None of the newest short-form statutes is adequate. Excellent forms and precise definitions are not enough. To function as an alternative to an attorney-prepared document, the statutory form must, somehow, fulfill the attorney's counseling function. The only advice the most recent forms give is, by and large, a warning that the granted powers are sweeping and a suggestion that the reader seek independent advice if questions arise.⁷⁸ The 1987 Illinois form is

addition of a general power for "Proprietary Interests and Materials," a power relating to intellectual property. *See id.* §§ 49-1522, -1553.

Each general power definition incorporates by reference varying numbers of up to 20 specific authorities, none of which appear in the form. They include specific authorities for acquisitions; ancillary matters; assistants; claims; compensation; contracts; disclosure, names, and signatures; dispositions; documents; encumbrances; improvements; insolvency proceedings; investments; maintenance; proceeds; reimbursements; reorganizations; reports; taxes; and trusts. *See id.* §§ 49-1522, -1525 to -1556.

⁷⁷ *Id.* § 49-1559.

⁷⁸ The following are the texts of the "warnings" given in the most recent forms:

THE POWERS GRANTED FROM THE PRINCIPAL TO THE AGENT OR AGENTS IN THE FOLLOWING DOCUMENT ARE VERY BROAD. THEY MAY INCLUDE THE POWER TO DISPOSE, SELL, CONVEY, AND ENCUMBER YOUR REAL AND PERSONAL PROPERTY, AND THE POWER TO MAKE YOUR HEALTH CARE DECISIONS. ACCORDINGLY, THE FOLLOWING DOCUMENT SHOULD ONLY BE USED AFTER CAREFUL CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT THIS DOCUMENT, YOU SHOULD SEEK COMPETENT ADVICE. YOU MAY REVOKE THIS POWER OF ATTORNEY AT ANY TIME.

ALASKA STAT. § 13.26.332 (Supp. 1991).

NOTICE: CONSULT YOUR LAWYER TO DETERMINE THE LEGAL EFFECT OF THE USE OF THIS NEBRASKA STATUTORY SHORT FORM.

NEB. REV. STAT. § 49-1505(6) (1988).

THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THIS FORM, THE NEW MEXICO STATUTORY SHORT FORM UNDER SECTION 45-5-502 [sic] NMSA 1978, DOES NOT PROHIBIT THE USE OF ANY OTHER FORM.

N.M. STAT. ANN. § 45-5-501(B) (Michie 1989).

the only statutory short-form that makes a significant effort to explain the purpose of a power of attorney and the functions of an agent, instead of merely providing the mechanics.⁷⁹ Overall, the more

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

UNIF. STATUTORY FORM POWER OF ATTORNEY ACT § 1, 8A U.L.A. 152-53 (Supp. 1991).

⁷⁹ The following is the text of the Illinois warning for its property power. A separate warning is provided for its health care power:

(NOTICE: THE PURPOSE OF THIS POWER OF ATTORNEY IS TO GIVE THE PERSON YOU DESIGNATE (YOUR "AGENT") BROAD POWERS TO HANDLE YOUR PROPERTY, WHICH MAY INCLUDE POWERS TO PLEDGE, SELL OR OTHERWISE DISPOSE OF ANY REAL OR PERSONAL PROPERTY WITHOUT ADVANCE NOTICE TO YOU OR APPROVAL BY YOU. THIS FORM DOES NOT IMPOSE A DUTY ON YOUR AGENT TO EXERCISE GRANTED POWERS; BUT WHEN POWERS ARE EXERCISED, YOUR AGENT WILL HAVE TO USE DUE CARE TO ACT FOR YOUR BENEFIT AND IN ACCORDANCE WITH THIS FORM AND KEEP A RECORD OF RECEIPTS, DISBURSEMENTS AND SIGNIFICANT ACTIONS TAKEN AS AGENT. A COURT CAN TAKE AWAY THE POWERS OF YOUR AGENT IF IT FINDS THE AGENT IS NOT ACTING PROPERLY. YOU MAY NAME SUCCESSOR AGENTS UNDER THIS FORM BUT NOT CO-AGENTS. UNLESS YOU EXPRESSLY LIMIT THE DURATION OF THIS POWER IN THE MANNER PROVIDED BELOW, UNTIL YOU REVOKE THIS POWER OR A COURT ACTING ON YOUR BEHALF TERMINATES IT, YOUR AGENT MAY EXERCISE THE POWERS GIVEN HERE THROUGHOUT YOUR LIFETIME, EVEN AFTER YOU BECOME DISABLED. THE POWERS YOU GIVE YOUR AGENT ARE EXPLAINED MORE FULLY IN SECTION 3-4 OF THE ILLINOIS "STATUTORY SHORT FORM POWER OF ATTORNEY FOR PROPERTY LAW" OF WHICH THIS FORM IS A PART (SEE THE BACK OF THIS FORM). THAT LAW EXPRESSLY PERMITS THE USE OF ANY DIFFERENT FORM OF POWER OF ATTORNEY YOU MAY DESIRE. IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER

recent statutory forms do not represent progress, but rather a step backwards.

IV. THE DURABLE POWER BANK ACCOUNT⁸⁰

A joint tenancy bank account can be one of the probate lawyer's biggest nightmares. The signature card states that the survivor takes the entire account, but following the depositor's death the attorney may discover that the depositor did not intend to create a true joint tenancy. Instead, the depositor created the account for purposes of "convenience." The other joint tenant was supposed to have authority to pay the depositor's bills but was not to receive the funds at the depositor's death. Litigation then ensues to determine whether the evidence of that intent is sufficient to rebut the presumption that the signature card controls.⁸¹

This problem has persisted for decades despite continued calls for clarifying legislation and pleas to bankers to exercise care in handing out joint tenancy signature cards.⁸² The durable power is

TO EXPLAIN IT TO YOU.)

ILL. ANN. STAT. ch. 110 1/2, para. 803-3 (Smith-Hurd Supp. 1992) (footnote omitted). Other helpful hints are contained in the form. See *id.*

⁸⁰ The legislation discussed in this section applies to commercial banks and, depending on the jurisdiction, to credit unions, savings banks, and savings and loan associations. The terms "bank" and "bankers" are, therefore, used generically and for ease of reference and are not strictly limited to their institutional setting.

⁸¹ This type of litigation is voluminous. For a collection of the cases, see Gary D. Spivey, Annotation, *Creation of Joint Savings Account or Savings Certificate as Gift to Survivor*, 43 A.L.R. 3d 971 (1972). Litigation has traditionally arisen because "[t]he contract between the bank and the depositor only instructs the bank to make payment to designated parties. It does not determine ownership of the depositor's interest in any manner." Donald Kepner, *Five More Years of the Joint Bank Account Muddle*, 26 U. CHI. L. REV. 376, 386 (1959).

⁸² See, e.g., N. William Hines, *Personal Property Joint Tenancies: More Law, Fact and Fancy*, 54 MINN. L. REV. 509, 528, 530, 552-59 (1970) (comments that existing banking and property laws consistently fail to facilitate a depositor's intention, notes the general unavailability of "convenience" account arrangements, and calls for legislation that would provide for standardized account forms, including a convenience rider); Michael L. Johnson, *Survivorship Interests with Persons Other*

an excellent alternative for bankers to consider. A depositor may grant an agent authority to pay bills without granting the agent an ownership interest, and the agency may survive into incapacity, when it is most needed. The durable power option has yet to take hold, however.⁸³ Perhaps that is because of a lack of readily available account forms⁸⁴ and because banks fear potential liability for making payments after the principal's death,⁸⁵ a concern that does not apply if a joint account is substituted.⁸⁶

Than a Spouse: The Costs of Probate Avoidance, 20 REAL PROP. PROB. & TR. J. 985, 1002-07 (1985) (bemoans the failure to seek professional advice in the creation of nonspousal joint tenancies and the inadequate explanations by bank employees; calls for and supplies a form of joint tenancy account disclosure statement); Kepner, *supra* note 81, at 403-04 (requests that banks permit joint accounts without survivorship and calls for legislation that distinguishes between the convenience and gift joint accounts).

⁸³ Professor McGovern expressed a dissenting view. William M. McGovern, Jr., *The Payable on Death Account and Other Will Substitutes*, 67 NW. U. L. REV. 7 (1972). He noted that some institutions were careful to warn against the dangers of convenience accounts and made an effort to supply power of attorney forms. *Id.* at 18. Yet the author of this article, who practiced in Chicago for eight years, found that power of attorney bank accounts were rarely encountered and then only if the client had made a special request.

⁸⁴ See, e.g., *In re Creekmore's Estate*, 135 N.E.2d 193 (N.Y. 1956), in which the decedent's attorney was told at a savings bank from which he requested power of attorney forms, "that the bank was opposed to accepting powers of attorney, that they did so only under protest, that they had no power of attorney forms available, and recommended that the accounts be changed to joint accounts." *Id.* at 194-95.

⁸⁵ The UPC's general durable power provisions, for example, protect a bank in following an agent's direction until the bank has actual knowledge of the principal's death, or, in the case of a nondurable power, until it has actual knowledge of the principal's death or incapacity. See UNIF. PROBATE CODE § 5-504, 8 U.L.A. 516 (1983). However, the statute does not define "actual knowledge." If a bank employee habitually clips obituary notices, would the employee's actual knowledge be instantly imputed to the bank and to all of its branches?

⁸⁶ Under traditional bank protection statutes, a bank could not incur liability for making payments in accordance with the account contract. For a detailed discussion, see Donald Kepner, *The Joint Survivorship Bank Account--A Concept Without a Name*, 41 CAL. L. REV. 596, 604-12 (1953). Under the UPC's more modern multiple-party account provisions in effect until 1989, the bank was protected until it received a written notice that withdrawals in accordance with the account's terms should not be permitted. See UNIF. PROBATE CODE § 6-112, 8 U.L.A. 532 (1983). For the post-1988 protective provision, see *infra* note 100 and accompanying text.

Although durable power bank accounts are rarely used, that failure is not due to a lack of legislative attention. Wisconsin has authorized the device since 1974⁸⁷ and Washington since 1981.⁸⁸ However, since 1988, the durable power bank account has come into its own, with the UPC and four additional states joining the list of enacting jurisdictions.⁸⁹ Of the four, the North Carolina approach is the simplest in concept.⁹⁰ It authorizes the creation of an agency account that may survive incapacity,⁹¹ and it provides a form to use in creating the account.⁹² Unfortunately, North Carolina does not

⁸⁷ Act published June 15, 1974, ch. 291, § 12, 1973 Wis. Laws 829, 830-34 (codified as amended at WIS. STAT. ANN. §§ 705.01-.08 (West 1981 & Supp. 1991)). Under the Wisconsin statute, an account is automatically durable if the spouse is the agent. WIS. STAT. ANN. § 705.02(2) (West 1981 & Supp. 1991). Otherwise, the account contract or independent power of attorney must provide that the agency survives the legal disability of a party to the account. *Id.* § 705.05(3) (West 1981).

⁸⁸ Financial Institution Individual Account Deposit Act, ch. 192, 1981 Wash. Laws 866 (codified as amended at WASH. REV. CODE ANN. §§ 30.22.010-.900 (West 1986 & Supp. 1991)). The Washington statute creatively responds to bankers' concerns about liability for payments made after a depositor's death. Washington protects a bank until it has had a reasonable opportunity to act following its receipt of written notice—a notice that must be given to the manager or an officer of the bank in which the account is maintained. *Id.* §§ 30.22.040(2), -.170 (West 1986). Washington also incorporates a springing power concept. The contract creating an agency account may provide that an agent's authority to receive payments or make withdrawals continues in spite of, or arises by virtue of, the incompetency of the depositor. *Id.* § 30.22.170.

Pre-1988 enactments are also in effect in Minnesota and Tennessee. Although neither state expressly grants statutory authority to create a durable power bank account, both the Minnesota and the Tennessee multiple-party account statutes indirectly authorize the device by including cross-references to their general durable power of attorney statutes. MINN. STAT. ANN. § 528.15 (West Supp. 1992); TENN. CODE ANN. § 45-2-707 (Supp. 1991).

⁸⁹ See *infra* notes 90-111 and accompanying text.

⁹⁰ Act of July 8, 1988, ch. 1078, 1988 N.C. Sess. Laws 497 (codified as amended in scattered titles of N.C. GEN. STAT.). The act includes disclosure statements that must be provided to depositors opening joint accounts, trust accounts, and agency accounts at banks, credit unions, and savings and loan associations. A separate set of statutory provisions is provided for each type of financial institution.

⁹¹ See, e.g., N.C. GEN. STAT. § 53-146.3(c) (Supp. 1991) (banks).

⁹² To create an agency account, a depositor must acknowledge that the funds will pass to his or her estate, and that the agent has the right to sign checks and to make deposits. *Id.* § 53-146.3(a).

have a clear-cut test of bank liability. Instead, liability for payments made after death depends upon whether the bank had "actual knowledge" of the death.⁹³

The most significant recent development in bank powers of attorney is the 1989 revision of Article VI of the UPC,⁹⁴ which Colorado has already adopted.⁹⁵ The UPC now authorizes a depositor to create an agency account that may survive incapacity.⁹⁶ Unlike North Carolina, however, the UPC solution is not simple. The UPC provides an omnibus form that covers not only the creation of agency accounts, but also joint accounts, Totten trusts, and payable-on-death accounts, which are referred to by different terms.⁹⁷ The form is complex, confusing,⁹⁸ and, for all practical

⁹³ *Id.* § 53-146.3(d). For a brief discussion of this test within the context of the UPC, see *supra* note 85.

⁹⁴ The provisions applicable to what are termed multiple-party accounts are now located at UNIF. PROBATE CODE §§ 6-210 to -227, 8 U.L.A. 284-95 (Supp. 1991). They have also been separately approved in the form of the UNIF. MULTIPLE-PERSON ACCOUNTS ACT, 8A U.L.A. 131 (Supp. 1991). For the prior provisions, see UNIF. PROBATE CODE §§ 6-101 to -113, 8 U.L.A. 520-33 (1983) (amended 1989).

⁹⁵ Act approved May 31, 1990, ch. 116, § 1, 1990 Colo. Sess. Laws 908, 910-17 (codified at COLO. REV. STAT. ANN. § 15-15-201 to -227 (West Supp. 1991)). Colorado adopted the uniform act without significant substantive change.

⁹⁶ The UPC's new statutory account form requires the deposit to designate whether the agency is to survive or terminate upon incapacity. UNIF. PROBATE CODE § 6-204(a), 8 U.L.A. 286-87 (Supp. 1991).

⁹⁷ Unlike the former multiple-party provisions, there is no provision for a Totten trust account, joint account, or payable-on-death account, as such. Accounts are either "multiple-party accounts" or "single-party accounts." A single-party account may be created with or without a payable-on-death (POD) designation, and with or without an agency designation. A multiple-party account may be created with or without a right of survivorship, with or without a POD designation, and with or without an agency designation. See *id.* §§ 6-201, -203 & cmts., 8 U.L.A. 284-86.

⁹⁸ For the form see *id.* § 6-204(a), 8 U.L.A. 286-87. To successfully complete the form, one must ask the following questions:

- (1) Do I wish to create a single-party account or a multiple-party account?
- (2) If a single-party account, do I wish it to be with or without a POD designation?
- (3) If a multiple-party account, do I wish to provide for (a) a right of survivorship, (b) a right of survivorship and a POD designation, or (c) no right of survivorship?

purposes, mandatory.⁹⁹ The new UPC provisions do, however, respond to bankers' concerns about liability by providing that the bank cannot be held liable until it has (1) received written notice to stop payments and (2) had a reasonable opportunity to act upon the notice.¹⁰⁰

The 1989 Connecticut and California statutes are the most innovative of the recent attempts.¹⁰¹ Instead of merely providing a statutory form or adding minor refinements relating to bank liability, the statutes creating California's new special power of attorney account and Connecticut's new durable power of attorney account make an effort to respond to bankers' needs for simplicity and certainty.

California and Connecticut accomplished these improvements, in part, by enacting self-contained statutes. Bankers need no longer look to the general durable power provisions or to other banking statutes to locate fundamental principles.¹⁰² The new acts even cover the requirements for the creation or termination of a power of

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- (4) Do I wish to designate an agent and, if so, will the agency survive incapacity or terminate upon incapacity?

⁹⁹ The use of the form is not technically mandatory. The Commissioners note, however, that the form is based upon the terminology used in the statute. In addition, a financial institution that uses the statutory form "is protected in acting in reliance on the form of the account." *Id.* § 6-204 cmt., 8 U.L.A. 287. One assumes, therefore, that banks would play it safe and use the prescribed form.

¹⁰⁰ Protection from liability ceases once the bank has had a reasonable opportunity to act following its receipt of a written notice to the effect that payments should not be permitted. *Id.* § 6-226(b), 8 U.L.A. 295. The Washington statute also requires that the bank be given a reasonable opportunity to act. However, the Washington statute, unlike the UPC, requires delivery of the notice to a responsible officer at the pertinent branch. WASH. REV. CODE ANN. §§ 30.22.04(2), -.170 (West 1986). See discussion *supra* note 88.

¹⁰¹ Act approved Sept. 12, 1989, ch. 397, § 27, 1989 Cal. Stat. ___, ___ (codified at CAL. PROB. CODE § 5204 (West 1991)); Act approved May 10, 1989, Pub. Act 67, 1989 Conn. Acts 90 (Reg. Sess.) (codified at CONN. GEN. STAT. ANN. §§ 1-56a to -56b (West Supp. 1991)).

¹⁰² By contrast, North Carolina buried its agency provisions in its banking titles, and the agency provisions of the UPC form an integral part of its multiple-party account statute.

attorney.¹⁰³ Second, both states mandate a comprehensive but straightforward form. Connecticut includes the form in its statute and the California statute specifies in detail what the form must contain.¹⁰⁴ Although neither statute prohibits alternate forms, it is unlikely that banks will frequently offer their customers a choice, because the acts' protections apply only if the prescribed form is used. Moreover, bankers need not worry about explaining various options. The only decision that the principal must make is whether to create a power of attorney that may survive incapacity.¹⁰⁵

In addition, both statutes emphasize bank protection and attempt to provide workable rules. The California statute protects the bank by attempting to reduce the risk of mismanagement by the agent. The statute holds the agent to a code of conduct that must be set forth in the power. The agent must maintain books or records that will permit an accounting, if one is demanded.¹⁰⁶ Furthermore, the agent is liable for disbursements made without written authoriza-

¹⁰³ For example, California specifically provides for termination of a power of attorney upon revocation by the principal, termination of the account, death of the principal, or appointment of a guardian or conservator for the principal's estate. CAL. PROB. CODE § 5204(d) (West 1991). Connecticut mentions death of the principal and appointment of a conservator as terminating events. CONN. GEN. STAT. ANN. § 1-56b(e) (West Supp. 1991).

¹⁰⁴ California requires that a writing signed by the principal identify the agent or agents, the financial institution, and the account or accounts subject to the power. CAL. PROB. CODE § 5204(b) (West 1991).

Connecticut, on the other hand, has an actual signature card form in its statute. CONN. GEN. STAT. ANN. § 1-56b(a) (West Supp. 1991). Connecticut also requires a separate agreement for each account. *Id.* The signature card permits the principal to designate multiple agents and requires the principal to designate whether multiple agents may act separately or must act jointly. *Id.* In addition, the signature card contains standard language relating to the agent's authority to make deposits, to sign account transaction documents, and to make withdrawals. *Id.*

¹⁰⁵ Both statutes specifically provide that they are not to be construed to prohibit other forms of powers of attorney. CAL. PROB. CODE § 5204(j) (West 1991); CONN. GEN. STAT. ANN. § 1-56b(b) (West Supp. 1991). To stay within the protections of its act, however, Connecticut requires that its statutory form be used. CONN. GEN. STAT. ANN. § 1-56b(f) (West Supp. 1991). California permits supplementation as long as the form contains the minimum required language. CAL. PROB. CODE § 5204(c) (West 1991).

¹⁰⁶ CAL. PROB. CODE § 5204(h) (West 1991).

tion to persons other than the principal.¹⁰⁷ More importantly, a bank enjoys absolute protection if it relies on a power that is filed and valid on its face, and if the bank verified the signature.¹⁰⁸ Finally, California grants the bank a reasonable time in which to respond following its receipt of written notice of termination.¹⁰⁹

Connecticut's bank protection provisions emphasize administrative simplicity. For instance, Connecticut addresses the potentially thorny problem of whether multiple agents may act independently or must act jointly. Connecticut provides check processing departments with a clear rule: joint action is required unless otherwise specified, a requirement that is carefully specified in the prescribed form.¹¹⁰ In addition, Connecticut provides a workable rule for determining liability for payments made after death by requiring written notice to a responsible officer and a reasonable opportunity for the bank to act. Furthermore, in no event does the bank have less than two business days to respond following its receipt of notice.¹¹¹

To some, the new California and Connecticut approaches may appear overly protective of financial institutions. On the other hand, durable power bank account statutes of this type may be the only way to induce financial institutions to permit the designation of agents and thereby end the inappropriate use of the joint tenancy "convenience" account.

¹⁰⁷ *Id.* § 5204(i).

¹⁰⁸ *Id.* § 5204(e). For a comparable provision that protects third parties who rely on a power of attorney, no matter what type, see CAL. CIV. CODE § 2512(a) (West Supp. 1991) (protection provided if power presented by agent named in power, if power appears valid on its face, and if power includes a notary's certificate of acknowledgment).

¹⁰⁹ CAL. PROB. CODE § 5204(g) (West 1991). California further provides that no other information shown to have been available to the financial institution shall affect the requirement that written notice be given. *Id.*

¹¹⁰ CONN. GEN. STAT. ANN. § 1-56b(a) (West Supp. 1991) (form); *id.* § 1-56b(c) (statute).

¹¹¹ *Id.* § 1-56b(f). The Connecticut rule is very precise. The notice must be received by an officer at the institution's main office during regular business hours. *Id.*

V. THE DURABLE POWER FOR HEALTH CARE

A. Overview

Statutes authorizing durable powers of attorney for health care, at a minimum, clarify that a principal may grant authority to an agent to make health care decisions on the principal's behalf. Such clarification may be unnecessary given the growing trend recognizing that authority to delegate health care decisions may be implied from a general durable power of attorney statute.¹¹² Nevertheless, the perception that a legislative solution is required has, since 1982,¹¹³ compelled legislatures in forty-one jurisdictions to enact legislation explicitly ratifying the use of durable powers of attorney for health care.¹¹⁴

This rush to legislate is the product of several converging influences. One influence is the growing recognition that it is better for physicians to rely on a person selected by the patient than to rely

¹¹² See, e.g., *In re Peter*, 529 A.2d 419, 426 (N.J. 1987) (general durable power statute should be interpreted to permit the principal to authorize the making of medical decisions); *In re Westchester County Medical Center ex rel. O'Connor*, 531 N.E.2d 607, 612 n.2 (N.Y. 1988) (doctrine of nondelegable acts no longer bars appointment of agent for purpose of communicating express desires as to withholding or withdrawal of life-sustaining treatment); 73 Op. Att'y Gen. 162 (Md. 1988) (legislature, in several health statutes, recognized that a principal may grant an agent authority to make health care decisions); 77 Op. Att'y Gen. 156 (Wis. 1988) (nondelegation doctrine does not apply to health care powers).

¹¹³ Pennsylvania was the first state to authorize the use of a durable power to implement health care decisions. Act approved Feb. 18, 1982, Act 26, § 9, 1982 Pa. Laws 45, 65-71 (codified at 20 PA. CONS. STAT. ANN. §§ 5601-5607 (Supp. 1991)). For a brief description of the Pennsylvania statute, see *infra* note 121.

¹¹⁴ There is, unfortunately, no consistency among the statutes in the terminology employed. The document signed by the principal is most often referred to as a durable power of attorney for health care, but variations include health care power of attorney, health care proxy, health care designation, and medical power of attorney. In addition to the traditional agent or attorney in fact, the statutes refer to surrogates, patient advocates, and representatives, and the principal is on occasion termed a patient or grantor.

on the family's uncertain authority.¹¹⁵ A related influence is the recognition that the number of elderly persons without close family is increasing and that guardianship may be a cumbersome alternative at best.¹¹⁶ The strongest influence is the emerging consensus that the existing living will statutes are inadequate. Many criticize living will statutes for requiring the declarant to make a decision as to future care far in advance, without knowledge of the particular circumstances that may then exist. Under a durable power, however, a competent person, the agent, can make an informed decision when the health care is required.¹¹⁷

¹¹⁵ The medical community's traditional reliance on the family is often based on little more than medical custom. Whether a family member has such authority as a matter of legal fact depends upon the relationship to the incapacitated person, the nature of the specific treatment, and the jurisdiction's view on that question. See Elaine B. Krasik, Comment, *The Role of the Family in Medical Decisionmaking for Incompetent Adult Patients: A Historical Perspective and Case Analysis*, 48 U. PITT. L. REV. 539 (1987). Moreover, even if family authority is accepted, deference to an agent is preferred. The use of an agent avoids such questions as: who belongs to the family; which family member is to make the decision; what happens if family members disagree; what happens if a family member proceeds in bad faith or ignorance; and how is the propriety of a family member's decision to be judged? See generally Judith Areen, *The Legal Status of Consent Obtained from Families of Adult Patients to Withhold or Withdraw Treatment*, 258 J. AM. MED. ASS'N 229 (1987).

¹¹⁶ The Florida legislature, for example, explained the need for its 1990 enactment of detailed provisions authorizing the appointment of health care surrogates for patients at hospitals, nursing homes, and hospices as follows: "The Legislature finds that an increasing number of patients in hospitals or nursing homes lack the capacity to provide express and informed consent for medical treatment and surgical and diagnostic procedures. These patients may not have a family or a guardian. . . ." Among the purposes of the act is to "[p]rovide an alternative to the guardianship process by which a person may designate a surrogate to make health care decisions for him before any incapacity." Act approved July 2, 1990, ch. 232, § 11, 1990 Fla. Laws 1729, 1745. Given their narrow scope, the Florida surrogacy provisions have not been analyzed in detail. Florida, in the same act, also amended its general durable power statute to allow a principal to grant an agent health care authority. See *infra* note 121.

¹¹⁷ Dean Areen notes that under most living will statutes, the directive becomes operative only if the patient becomes terminally ill, that many living will forms fail to make clear which forms of care may be foregone, and that "a living will, no matter how detailed, cannot possibly anticipate the full range of difficult treatment decisions that may have to be made." Areen, *supra* note 115, at 230. She concludes that the durable power is "[a]n increasingly attractive choice." *Id.* Other disadvantages of a

Durable power of attorney for health care statutes come in several forms.¹¹⁸ The most common type of legislation includes a statutory form directed exclusively at health care matters and contains detailed requirements as to the form's execution and implementation.¹¹⁹ Other approaches include adding health care authority to a statutory short-form,¹²⁰ amending general durable power statutes to clarify that a principal may delegate health care

living will, not shared by the durable power for health care, include its inconsistency with the doctrine of informed consent, its failure to take into account a change of mind between the date of its execution and the time of its use, its prohibitions against the withdrawing of certain forms of treatment, and its failure to respond to persons who may want maximum care and treatment. See Francis J. Collin, Jr., *Planning and Drafting Durable Powers of Attorney for Health Care*, 22 INST. EST. PLAN. ¶¶ 500, 504.2 (1988).

¹¹⁸ Not included here are statutes that authorize the designation of an agent for the purpose of implementing a living will or making a decision regarding the provision of life-sustaining treatment. See, e.g., ARK. STAT. ANN. § 20-17-201(10) (Michie 1991); DEL. CODE ANN. tit. 16, § 2502(b) (1983); MINN. STAT. ANN. § 145B.06.2 (West Supp. 1992).

¹¹⁹ Statutory forms of health care powers have been enacted in California, the District of Columbia, Georgia, Idaho, Iowa, Illinois, Kansas, Kentucky, Nevada, New Hampshire, New York, North Carolina, North Dakota, Oregon, Rhode Island, Texas, Utah, Vermont, West Virginia, and Wisconsin. For a list of citations, see *infra* notes 124-30. For a detailed analysis of the statutory form durable power for health care, see *infra* text accompanying notes 124-266.

Utah's statute varies significantly from the other statutes. Utah's special power of attorney provision allows the principal to appoint an agent for the purpose of executing a "directive" in the event the principal should incur an injury, disease, or illness which renders the principal unable to give current directions to health care providers. The power is effective upon the attending physician's certification of the principal's inability to give current directions. UTAH CODE ANN. § 75-2-1106 (Supp. 1990). The "directive" to be executed is a signed agreement between the attending physician and the agent that describes the principal's condition and specifies the care or treatment to be provided or the care or treatment to be withheld. See *id.* § 75-2-1105(4).

¹²⁰ For a general discussion of the statutory short-form, see *supra* text accompanying notes 51-79. For a discussion of the health care authority under the Alaska, Connecticut, and New Mexico forms, see *supra* notes 66-68 and accompanying text.

authority to an agent,¹²¹ enacting family health care consent statutes that name the agent as one of the permissible decisionmakers,¹²² and adopting statutes that prescribe detailed requirements as to the power's execution and implementation but which do so without the

¹²¹ See COLO. REV. STAT. ANN. § 15-14-501(1), -506 (West Supp. 1991) (principal may grant agent authority to consent to medical care, counsel, treatment, or service by certified professional or institution); FLA. STAT. ANN. § 709.08(1) (West Supp. 1991) (power may authorize agent to arrange for and consent to medical, therapeutical, and surgical procedures, including the administration of drugs); IND. CODE ANN. §§ 30-5-5-16 to -17 (Burns Supp. 1992) (power may grant agent general authority with respect to health care, including the authority to consent to or refuse health care and, with express authorization, to withdraw or withhold health care); LA. CIV. CODE ANN. art. 2997(A)(7) (West Supp. 1991) (power may authorize agent to make health care decisions but may not authorize agent to make a declaration of life-sustaining procedures); ME. REV. STAT. ANN. tit. 18-A, § 5-501 (West Supp. 1991) (principal may grant agent authority to consent to or withhold any medical or other professional care for the principal, the health care power must be notarized and the court, instead of the guardian, is given the authority to revoke or suspend the agent's authority); 20 PA. CONS. STAT. ANN. § 5603(h) (Supp. 1991) (by including statutorily prescribed phrases in the document, the principal incorporates detailed statutory definitions into the power of attorney; phrases relating to health care are a power "to authorize my admission to a medical, nursing, residential or similar facility, and to enter into agreements for my care," and a power "to authorize medical and surgical procedures"); S.C. CODE ANN. § 62-5-501(A) (Law. Co-op. Supp. 1991) (principal may grant agent authority to consent or to withhold consent to health care); S.D. CODIFIED LAWS ANN. §§ 59-7-2.1, -2.7 to -2.8 (Supp. 1992) (principal may authorize agent to consent, to reject, or to withdraw consent for medical procedures, treatment, or intervention, but in the absence of express authority, severe restrictions are placed on the withholding or withdrawal of artificial nutrition and hydration); WASH. REV. CODE ANN. § 11.94.010(3) (West Supp. 1992) (principal may authorize agent to give informed consent, but the following persons are disqualified from acting as agents unless the person is also a spouse, adult child, or brother or sister of the principal: the principal's physician, the physician's employees, and owners and employees of the health facility in which the principal resides or receives care). New Mexico's provision also is codified as part of its general durable power statute. For a description, see *supra* note 67.

¹²² Virginia's family consent statute provides that an agent under a durable power may make a decision to provide, withdraw, or withhold treatment if the power so authorizes, a licensed physician determines after personal examination that the principal is incapable of making an informed decision, and the agent is not employed by the physician or the organization employing the physician. VA. CODE ANN. § 37.1-134.4 (Michie Supp. 1991).

guidance of a statutory form of power.¹²³

Since 1988, the most commonly enacted type of legislation has included a statutory form. The statutory form directed exclusively at health care is a recent phenomenon; the first was enacted in California in 1984.¹²⁴ Despite its recent initiation, its growth has been explosive. Forms were added in 1986 in Rhode Island,¹²⁵

¹²³ MASS. GEN. LAWS ANN. ch. 201D (West Supp. 1992); MICH. COMP. LAWS ANN. § 700.496 (West Supp. 1992); MISS. CODE ANN. §§ 41-41-151 to -183 (Supp. 1991); MO. ANN. STAT. §§ 404.800-.865 (Vernon Supp. 1992); N.J. STAT. ANN. §§ 26:2H-53 to -78 (West Supp. 1992); OHIO REV. CODE ANN. § 1337.11-.17 (Anderson Supp. 1991); TENN. CODE ANN. §§ 34-6-201 to -215 (Supp. 1991); WYO. STAT. §§ 3-5-101 to -213 (Supp. 1992). These statutes include all elements of a comprehensive statutory form enactment except the power of attorney form itself. Although they omit a standardized form of power, several of the statutes contain related form requirements. Ohio requires that a statutory form of warning be included with all commercially printed powers. OHIO REV. CODE ANN. § 1337.17 (Anderson Supp. 1991). Tennessee requires that a detailed warning be included with all powers that are not personally prepared by the principal. TENN. CODE ANN. § 34-6-205 (1991). In Mississippi, the warning must be included with all powers. MISS. CODE ANN. § 41-41-163 (Supp. 1991). Mississippi and Tennessee also prescribe a form for witnessing or acknowledgment. MISS. CODE ANN. § 41-41-159(1)(b) (Supp. 1991); TENN. CODE ANN. § 34-6-203(a)(3) (1991). Michigan prescribes a form for the agent's acceptance of office. MICH. COMP. LAWS ANN. § 700.496(7) (West Supp. 1992).

The innovative New Jersey statute is the first to authorize the creation of both living wills ("instruction directives") and durable powers of attorney for health care ("proxy directives"). Furthermore, a declarant may combine an instruction directive and a proxy directive into one document. However, no statutory form is provided. See N.J. STAT. ANN. §§ 26:2H-53 to -78 (West Supp. 1992).

¹²⁴ Keene Health Care Agent Act, ch. 312, § 8, 1984 Cal. Stat. 1554, 1558-67 (codified as amended at CAL. CIV. CODE §§ 2500-2508 (West Supp. 1992)). The statutory form enactment follows by one year the enactment of a separate statute governing the creation of a durable power of attorney for health care, the scope of authority that may be granted, methods of revocation, and the immunities of health care providers. See Act filed Sept. 29, 1983, ch. 1204, § 10, 1983 Cal. Stat. 4610, 4615-22 (codified as amended at CAL. CIV. CODE §§ 2430-2443 (West Supp. 1992)).

¹²⁵ Act approved June 24, 1986, ch. 190, 1986 R.I. Pub. Laws 274 (codified as amended at R.I. GEN. LAWS §§ 23-4.10-1 to -2 (1989)).

followed by Illinois and Nevada in 1987,¹²⁶ the District of Columbia, Idaho, and Vermont in 1988,¹²⁷ Kansas, Oregon, and Texas in 1989,¹²⁸ Georgia, Kentucky, New York, West Virginia, and Wisconsin in 1990,¹²⁹ and Iowa, New Hampshire, North Carolina and North Dakota in 1991.¹³⁰

Unlike the statutory short-forms directed exclusively or primarily at property matters, the durable power for health care forms are

¹²⁶ Powers of Attorney for Health Care Law, Pub. Act 85-701, Art. IV, 1987 Ill. Laws 2930, 2940-48 (codified as amended at ILL. ANN. STAT. ch. 110½, paras. 804-1 to -12 (Smith-Hurd Supp. 1992)); Act approved June 11, 1987, ch. 396, 1987 Nev. Stat. 913 (codified as amended at NEV. REV. STAT. ANN. §§ 449.800-860 (Michie 1991)).

¹²⁷ Health Care Decisions Act of 1988, D.C. Law 7-189, 35 D.C. Reg. 8653 (codified as amended at D.C. CODE ANN. §§ 21-2201 to -2213 (1989 & Supp. 1992)); Act approved Mar. 30, 1988, ch. 262, § 5, 1988 Idaho Sess. Laws 508, 511-15 (codified at IDAHO CODE § 39-4505 (Supp. 1992)); Act approved May 24, 1988, Pub. Act 223, 1988 Vt. Laws 285 (codified as amended at VT. STAT. ANN. tit. 14, §§ 3451-3467 (1989 & Supp. 1991)).

¹²⁸ Act approved Apr. 25, 1989, ch. 181, 1989 Kan. Sess. Laws 1202 (codified at KAN. STAT. ANN. §§ 58-625 to -632 (Supp. 1991)); Act approved. Aug. 2, 1989, ch. 914, 1989 Or. Laws 1748 (codified as amended at OR. REV. STAT. §§ 127.505-.585 (1991)); Act effective June 14, 1989, ch. 491, 1989 Tex. Gen. Laws 1669 (codified as amended at TEX. CIV. PRAC. & REM. CODE ANN. §§ 135.001-.018 (West Supp. 1992)).

¹²⁹ Durable Power of Attorney for Health Care Act, Act 1259, 1990 Ga. Laws 1101 (codified at GA. CODE ANN. §§ 31-36-1 to -13 (Michie 1991)); Health Care Surrogate Act of Kentucky, ch. 123, 1990 Ky. Acts 265 (codified at KY. REV. STAT. ANN. §§ 311.970-.986 (Michie/Bobbs-Merrill Supp. 1990)); Act approved July 22, 1990, ch. 752, 1990 N.Y. Laws 3547 (codified as amended at N.Y. PUB. HEALTH LAW § 2980-2994 (McKinney Supp. 1992)); Medical Power of Attorney Act, ch. 97, 1990 W. Va. Acts 785 (codified at W. VA. CODE §§ 16-30A-1 to -20 (1991)); Act of Apr. 12, 1990, Act 200, § 8, 1989 Wis. Laws 1160, 1161-68 (codified as amended at WIS. STAT. ANN. §§ 155.01-.80 (West Supp. 1992)).

¹³⁰ Act effective May 8, 1991, ch. 140, 1991 Iowa Acts 188 (codified at IOWA CODE ANN. §§ 144B.1 to -12 (West Supp. 1992)); Act effective July 19, 1991, ch. 146, 1991 N.H. Laws 196 (codified at N.H. REV. STAT. ANN. §§ 137-J:1 to -J:16 (Supp. 1991)); Act effective Oct. 1, 1991, ch. 639, § 1, 1991 N.C. Sess. Laws 1470, 1470-80 (codified at N.C. GEN. STAT. §§ 32A-15 to -26 (1991)); Act approved Apr. 16, 1991, ch. 266, 1991 N.D. Laws 716 (codified at N.D. CENT. CODE §§ 23-06.5-01 to -18 (1991)).

anything but short and simple. Their execution requirements are formidable.¹³¹ Worse yet, because requirements vary, the effectiveness of the form is substantially diminished for individuals who may move from state to state.¹³² Furthermore, many of the forms force principals to spell out their intent with exactitude. If the form is filled out correctly, maximum protection of the principal's intent is assured, but if the principal errs, the agent might not implement decisions that the principal would have made.¹³³ Finally, several of the statutes, following the lead of the living will acts, make it difficult for an agent to authorize withholding or withdrawing of life-sustaining treatment.¹³⁴

Given the numerous competing interests, there may be no satisfactory answers to the dilemmas created by the statutory form health care enactments.¹³⁵ Perhaps the best that can be done here is to lay out the critical elements of the forms and statutes, so that practitioners may at least have a guide through the shoals.

¹³¹ For a discussion of the execution requirements, see *infra* text accompanying notes 136-73.

¹³² The problem of nonconforming forms is discussed *infra* text accompanying notes 255-66.

¹³³ This problem can cut both ways. It is most acute in the provisions dealing with the withholding or withdrawing of life-sustaining treatment. The Illinois form, for example, permits the agent to withhold or withdraw all forms of life-sustaining treatment, including artificial nutrition and hydration, except to the extent that the principal has otherwise specified. ILL. ANN. STAT. ch. 110 1/2, para. 804-10 (Smith-Hurd Supp. 1992). The Oregon form and statute, on the other hand, prohibit the agent from withholding or withdrawing life-sustaining treatment unless the principal checks the appropriate lines or has otherwise made his or her wishes known. OR. REV. STAT. § 127.530 (1991) (form); *id.* § 127.540(b), -.580(1) (statute).

¹³⁴ See *infra* text accompanying notes 245-52.

¹³⁵ The conflict is sharpest over the issue of withdrawing or withholding life-sustaining treatment. The competing players include attorneys who draft the pertinent documents and who are called upon by their clients for counsel on the various available options, health care providers who are called upon to implement those decisions, and individuals and groups who, out of deeply held moral or religious beliefs, feel compelled to make their views known.

B. The Statutory Form Health-Care Power

1. Execution Requirements

General durable power of attorney statutes typically prescribe few or no execution requirements.¹³⁶ The statutory form health care enactments, in contrast, have been influenced by their statutory short-form siblings, all of which require acknowledgment,¹³⁷ or by their living-will cousins, which require witnessing.¹³⁸ Illinois is the only state with no execution requirements.¹³⁹ The other states require either that the power be signed by two witnesses,¹⁴⁰ that it

¹³⁶ See, e.g., UNIF. DURABLE POWER OF ATTORNEY ACT, 8A U.L.A. 275 (1983) (no execution requirements).

¹³⁷ See UNIF. STATUTORY FORM POWER OF ATTORNEY ACT § 1, 8A U.L.A. 329-31 (Supp. 1992) (acknowledgment required); ALASKA STAT. § 13.26.332 (Supp. 1991) (acknowledgment required); CONN. GEN. STAT. ANN. § 1-43(a) (West Supp. 1992) (acknowledgment in same manner as deed required); ILL. ANN. STAT. ch. 110 1/2, para. 803-3 (Smith-Hurd Supp. 1992) (acknowledgment required); MINN. STAT. ANN. § 523.23 (West 1990) (acknowledgment required); NEB. REV. STAT. § 49-1522 (1988) (acknowledgment required); N.M. STAT. ANN. § 45-5-501(B) (Michie 1989) (acknowledgments by both principal and agent required); N.Y. GEN. OBLIG. LAW § 5-1501(1) (McKinney 1989) (acknowledgment in same manner as deed required); N.C. GEN. STAT. § 32A-1 (1991) (acknowledgment required).

¹³⁸ Professor Gelfand, in his comprehensive survey of living will legislation, notes that all of the statutes require that a living will be witnessed by at least two persons. Gregory Gelfand, *Living Will Statutes: The First Decade*, 1987 Wis. L. REV. 737, 755-56.

¹³⁹ The Illinois statutory form provides for the signature of one witness, but the omission of the witness does not invalidate the power. Illinois specifically provides that a power of attorney need not be witnessed nor conform in any respect to the statutory form. ILL. ANN. STAT. ch. 110 1/2, para. 804-05 (Smith-Hurd Supp. 1990). For a detailed discussion of the Illinois statute, see Zartman, *supra* note 59.

¹⁴⁰ D.C. CODE ANN. § 21-2205(c) (1989); GA. CODE ANN. § 31-36-5(a) (Michie 1990); N.H. REV. STAT. ANN. § 137-J:5 (Supp. 1991); N.Y. PUB. HEALTH LAW § 2981(2) (McKinney Supp. 1992); N.D. CENT. CODE § 23-06.5-05 (1991); OR. REV. STAT. § 127.515(1)(b) (1991); R.I. GEN. LAWS § 23-4.10-2 (1989); TEX. CIV. PRAC. & REM. CODE ANN. § 135.004 (West Supp. 1992); VT. STAT. ANN. tit. 14, § 3456 (1989); WIS. STAT. ANN. § 155.10(1)(c) (West Supp. 1991).

be witnessed or acknowledged at the principal's option,¹⁴¹ or that it be both witnessed and acknowledged.¹⁴²

Just like for living wills,¹⁴³ or regular wills for that matter, the statutory form health care enactments prohibit certain individuals from acting as witnesses.¹⁴⁴ The most prevalent prohibition pertains to relatives and those with a financial interest in the principal's estate. Nine jurisdictions disqualify relatives by blood, marriage, or adoption;¹⁴⁵ one disqualifies relatives by blood or marriage;¹⁴⁶ one disqualifies the spouse and relatives by blood or adoption,¹⁴⁷ one disqualifies relatives of the principal and the principal's spouse,¹⁴⁸ and three disqualify the spouse and presumptive heirs.¹⁴⁹ In

¹⁴¹ IDAHO CODE § 39-4505 (Supp. 1992); IOWA CODE ANN. § 144B.3(1)(b) (West Supp. 1992); KAN. STAT. ANN. § 58-629(e) (Supp. 1991); KY. REV. STAT. ANN. § 311.974(1) (Michie/Bobbs-Merrill Supp. 1990); NEV. REV. STAT. ANN. § 449.840(1) (Michie 1991). California's optional statutory form must be witnessed. CAL. CIV. CODE § 2500 (West Supp. 1991). The statute, however, permits a durable power for health care to be either witnessed or acknowledged. CAL. CIV. CODE § 2432(a)(3) (West Supp. 1991).

¹⁴² N.C. GEN. STAT. § 32A-16(3) (1991); W. VA. CODE § 16-30A-6(a) (Supp. 1990).

¹⁴³ The witness eligibility rules for living wills are described in detail in Gelfand, *supra* note 138, at 757-58.

¹⁴⁴ Georgia is the exception. It requires witnesses but does not impose eligibility requirements. GA. CODE ANN. § 31-36-5(a) (Michie 1991). In addition, although Kentucky and New York have witness eligibility requirements, their requirements are quite limited in scope. For the Kentucky requirements, see *infra* note 155 and accompanying text. For the New York requirements, see *infra* notes 153, 158 and accompanying text.

¹⁴⁵ CAL. CIV. CODE § 2432(e)(1) (West Supp. 1991); D.C. CODE ANN. § 21-2205(d) (1989); IDAHO CODE § 39-4505 (Supp. 1992); IOWA CODE ANN. § 144B.3(3) (West Supp. 1992); KAN. STAT. ANN. § 58-629(e)(1) (Supp. 1991); NEV. REV. STAT. ANN. § 449.840(3)(a) (Michie 1991); OR. REV. STAT. § 127.515(3)(a)(A) (1991); R.I. GEN. LAWS § 23-4.10-2 (1989); WIS. STAT. ANN. § 155.10(2)(a) (West Supp. 1990).

¹⁴⁶ W. VA. CODE § 16-30A-6(b)(2) (1991).

¹⁴⁷ N.D. CENT. CODE § 23-06.5-05 (1991).

¹⁴⁸ N.C. GEN. STAT. § 32A-16(6) (1991).

¹⁴⁹ N.H. REV. STAT. ANN. § 137-J:5 (Supp. 1991); TEX. CIV. PRAC. & REM. CODE ANN. § 135.004(b)(3) (West Supp. 1992); VT. STAT. ANN. tit. 14, § 3456 (1989). The disqualification of both the spouse and heirs is not necessarily redundant. In Vermont, for example, the spouse is not entitled to an intestate share

addition, most of the states disqualify persons entitled to take under the principal's current will¹⁵⁰ and several states extend the prohibition to beneficiaries under inter vivos deeds.¹⁵¹

Several jurisdictions have only a partial prohibition against family members and estate beneficiaries serving as witnesses. The power is valid if only one and not both of the witnesses is so disqualified.¹⁵² In nearly all jurisdictions, however, a power is invalid if even one witness is from one of the other ineligible classes. Those classes include the agent,¹⁵³ health care providers and employees

unless the decedent is not survived by issue. VT. STAT. ANN. tit. 14, § 551 (1989).

¹⁵⁰ CAL. CIV. CODE § 2432(e)(2) (West Supp. 1991) (will or codicil then existing or by operation of law); D.C. CODE ANN. § 21-2205(d) (1989) (current will or by operation of law); IDAHO CODE § 39-4505 (Supp. 1992) (will then existing or by operation of law); KAN. STAT. ANN. § 58-629(e)(1) (Supp. 1991) (laws of intestate succession of the state or under any will or codicil of the principal); NEV. REV. STAT. ANN. § 449.840(3)(b) (Michie 1991) (persons entitled to any part of the estate of the principal); N.C. GEN. STAT. § 32A-16(6) (1991) (existing will or codicil or by intestacy); OR. REV. STAT. § 127.515(3)(a)(B) (1991) (person who at the time of execution would be entitled to any portion of the estate under will or by operation of law); R.I. GEN. LAWS § 23-4.10-2 (1989) (will then existing or by operation of law); W. VA. CODE § 16-30A-6(b)(3) (1991) (laws of intestate succession of principal's domicile or under any will or codicil); WIS. STAT. ANN. § 155.10(2)(b) (West Supp. 1991) (person entitled to any portion of the estate).

¹⁵¹ N.H. REV. STAT. ANN. § 137-J:5 (Supp. 1991) (will, trust or other testamentary instrument or deed in existence or by operation of law); N.D. CENT. CODE § 23-06.5-05 (1991) (will or deed in existence or by operation of law); TEX. CIV. PRAC. & REM. CODE ANN. § 135.004(b)(4) (West Supp. 1992) (will or deed in existence or by operation of law); VT. STAT. ANN. tit. 14, § 3456 (1989) (will or deed in existence or by operation of law).

¹⁵² CAL. CIV. CODE § 2432(e) (West Supp. 1991); D.C. CODE ANN. § 21-2205(d) (1989); IDAHO CODE § 39-4505 (Supp. 1992); IOWA CODE ANN. § 144B.3(3) (West Supp. 1992); NEV. REV. STAT. ANN. § 449.840(3) (Michie 1991); OR. REV. STAT. § 127.515(3)(a) (1991); R.I. GEN. LAWS § 23-4.10-2 (1989).

¹⁵³ CAL. CIV. CODE § 2432(d)(3) (West Supp. 1991); IDAHO CODE § 39-4505 (Supp. 1992); IOWA CODE ANN. § 144B.3(2)(c) (West Supp. 1992); KAN. STAT. ANN. § 58-629(e)(1) (Supp. 1991); NEV. REV. STAT. ANN. § 449.840(2)(e) (Michie 1991); N.H. REV. STAT. ANN. § 137-J:5 (Supp. 1991); N.Y. PUB. HEALTH LAW § 2981(2)(a) (McKinney Supp. 1992); N.D. CENT. CODE § 23-06.5-05 (1991); OR. REV. STAT. § 127.515(3)(b)(A) (1991); R.I. GEN. LAWS § 23-4.10-2 (1989); TEX. CIV. PRAC. & REM. CODE ANN. § 135.004(b)(1) (West Supp. 1992); VT. STAT. ANN. tit. 14, § 3456 (1989); W. VA. CODE § 16-30A-6(b)(6) (1991); WIS. STAT. ANN. § 155.10(2)(e)

and, to a lesser extent, nursing home operators and employees.¹⁵⁴ Several states, however, allow providers and operators who are not currently treating the principal to serve as witnesses.¹⁵⁵

Concern over abuse of nursing home patients extends beyond the disqualification of nursing home operators and employees. California, for example, requires that its state advocate for the elderly act as one of the witnesses if the power is executed while the principal is a resident of a skilled nursing home.¹⁵⁶ Georgia

(West Supp. 1991).

¹⁵⁴ CAL. CIV. CODE § 2432(d) (West Supp. 1991) (health care providers and employees; operators and employees of community care and residential care facilities for the elderly); IDAHO CODE § 39-4505 (Supp. 1992) (health care providers and employees; operators and employees of community care facilities); NEV. REV. STAT. ANN. § 449.840(2) (Michie 1991) (health care providers and employees; operators and employees of health care facilities); R.I. GEN. LAWS § 23-4.10-2 (1989) (health care providers and employees; operators and employees of community care facilities). See *infra* note 155 for the other statutory provisions.

¹⁵⁵ D.C. CODE ANN. § 21-2205(c) (1989) (health care providers of principal and employees thereof); IOWA CODE ANN. § 144B.3(2) (West Supp. 1992) (health care provider or employee of a health care provider attending the principal); KY. REV. STAT. ANN. §§ 311.972(3), -.974(1) (Michie/Bobbs-Merrill Supp. 1991) (employees, owners, directors, or officers of health care facility in which principal is a resident or patient unless related within the fourth degree by blood or marriage); N.C. GEN. STAT. § 32A-16(6) (1991) (attending physician and employees; employees of health care facility, nursing home, or group care home in which principal resides or is a patient); N.D. CENT. CODE § 23.06.5-05 (1991) (principal's health or long-term care services provider or provider's employees); OR. REV. STAT. § 127.515(3)(b)(B) (1991) (attending physician); TEX. CIV. PRAC. & REM. CODE ANN. § 135.004(b)(2) (West Supp. 1992) (principal's health or residential care providers and their employees); VT. STAT. ANN. tit. 14, § 3456 (1989) (same); W. VA. CODE § 16-30A-6(b)(5) (1991) (attending physician); WIS. STAT. ANN. § 155.10(2)(d) (West Supp. 1991) (principal's health care providers). New Hampshire allows the principal's health or residential care providers or employees to act as one, but not as both, of the witnesses. N.H. REV. STAT. ANN. § 137-J:5 (Supp. 1991).

¹⁵⁶ CAL. CIV. CODE § 2432(f) (West Supp. 1991). The intent of this requirement is "to recognize that some patients in skilled nursing facilities are insulated from a voluntary decisionmaking role, by virtue of the custodial nature of their care, so as to require special assurance that they are capable of willfully and voluntarily executing a durable power of attorney for health care." *Id.*

requires the attending physician to act as a third witness in such cases,¹⁵⁷ and New York has enacted an intricate set of special witness rules.¹⁵⁸ North Dakota and Vermont, in what is perhaps a more effective move, require that the power be explained to the patient.¹⁵⁹

Before lining up witnesses, however, the principal must take care to select the correct form. The Oregon and Rhode Island statutory forms are mandatory and no substitutes are permitted.¹⁶⁰ Idaho's statutory form is technically optional, but because a substitute form must include all of the elements of the statutory form, it is in essence mandatory.¹⁶¹ Several of the other statutes also permit substitutes, but they are subject to a limited and ambiguous "substantial equivalence" test.¹⁶² The current trend, however, is to allow

¹⁵⁷ The attending physician must act as a third witness if the principal is a patient in a hospital or skilled nursing facility. GA. CODE ANN. § 31-36-5(a) (Michie 1991).

¹⁵⁸ The New York rules are not directed at nursing home patients per se, but are directed at patients who are residents at state facilities or at other mental health and developmental disability facilities. At least one of the two required witnesses cannot be an employee of the facility. In addition, for a patient at a mental health facility, one of the witnesses must be a psychiatrist. For a patient at a developmental disability facility, one of the witnesses must be a physician or clinical psychologist. See N.Y. PUB. HEALTH LAW § 2981(2) (McKinney Supp. 1992).

¹⁵⁹ N.D. CENT. CODE § 23-06.5-10(2) (1991); VT. STAT. ANN. tit. 14, § 3460(b) (1989). This requirement is, in a number of respects, more effective than the other provisions, which merely address signing requirements. Both North Dakota and Vermont require that the nature and effect of the power be explained to the patient. A statement certifying that the explanation has been made must then be signed. Just as importantly, the explanation may be made by a person with whom the patient may enjoy a close personal relationship, including the patient's attorney or clergy.

¹⁶⁰ OR. REV. STAT. § 127.530 (1991) ("A written power of attorney for health care . . . shall be in the following form"); R.I. GEN. LAWS § 23-4.10-1 (1989) ("The statutory form . . . shall be the only form by which a person may execute a durable power of attorney for health care").

¹⁶¹ IDAHO CODE § 39-4505 (Supp. 1992) ("A durable power of attorney for health care may be in the following form, or in any other form which contains the elements set forth in the following form.").

¹⁶² KAN. STAT. ANN. § 58-632 (Supp. 1991) ("substantially the following form"); NEV. REV. STAT. ANN. § 449.830 (Michie 1991) ("[T]he form . . . must be substantially as follows"); N.H. REV. STAT. ANN. § 137-J:15 (Supp. 1991) ("The

optional forms.¹⁶³

After securing the correct form and verifying the witness's credentials, the principal must review the procedures for execution, a ritual that in several jurisdictions is modeled after the Statute of Wills.¹⁶⁴ The principal will also need to check for additional execution requirements that are not widely shared but which apply in

durable power of attorney shall be in substantially the following form"); TEX. CIV. PRAC. & REM. CODE ANN. § 135.016 (West Supp. 1992) ("substantially the following form"); VT. STAT. ANN. tit. 14, § 3466 (1989) (same); W. VA. CODE § 16-30A-18 (1991) ("the following form or in such form which substantially complies with the requirements set forth herein").

¹⁶³ Prior to the 1990 enactments, only California, the District of Columbia, and Illinois included optional forms. See CAL. CIV. CODE § 2507 (West Supp. 1991); D.C. CODE ANN. § 21-2207 (1989); ILL. ANN. STAT. ch. 110 1/2, para. 804-10(a) (Smith-Hurd Supp. 1992). Optional forms are, however, provided in three of the five 1990 enactments, see GA. CODE ANN. § 31-36-10(a) (Michie 1991); KY. REV. STAT. ANN. § 311.974(2) (Michie/Bobbs-Merrill Supp. 1990); N.Y. PUB. HEALTH LAW § 2981(5)(d) (McKinney Supp. 1992); and in three of the four 1991 enactments, see IOWA CODE ANN. § 144B.5 (West Supp. 1992); N.C. GEN. STAT. § 32A-25 (1991); N.D. CENT. CODE § 23-06.5-15 (1991). Although the forms are optional, the drafter of an optional form should pay careful attention to matters such as the execution requirements and restrictions on agent eligibility. Wisconsin takes a slightly different approach. Use of its statutory form is required unless the instrument contains a prescribed form of disclosure statement or was prepared under the supervision of an attorney. See WIS. STAT. ANN. § 155.30 (West Supp. 1992).

¹⁶⁴ Some of the requirements include: a statement by the principal that the principal is aware of the nature of the document and is signing the document freely and voluntarily, see, e.g., VT. STAT. ANN. tit. 14, § 3466 (1989); a request by the principal that the witnesses serve as witnesses, see, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 135.004(c)(3) (West Supp. 1992), a requirement that the witnesses sign in the presence of each other and in the presence of the principal, see, e.g., IOWA CODE ANN. § 144B.3(1)(b)(1) (West Supp. 1992); and an affirmation by the witnesses that the principal appeared to be of sound mind and free from duress, see, e.g., N.H. REV. STAT. ANN. § 137-J:5 (Supp. 1991). All of these requirements, which must be recited in the attestation clause to the power, are adapted from the law of wills. Under the law of wills, at least, a failure to comply can lead to disastrous results. See *In re Taylor's Estate*, 165 N.W. 1079 (S.D. 1917) (will invalid due to failure of witness to read attestation clause, witness's lack of personal knowledge of testator, and failure of testator to declare the nature of the document and to request that witnesses serve as witnesses).

the principal's jurisdiction.¹⁶⁵

The requirement that the form be copied or substantially copied from the statute may help to ensure that the principal has considered all questions raised in the form and has read the detailed explanation or warning that is usually included.¹⁶⁶ It may also assist in reducing possible reluctance to honor durable powers for health care.¹⁶⁷ Yet, this requirement stifles creativity. Given the increasing sophistication of attorney-prepared durable powers, one wonders whether

¹⁶⁵ For example, Oregon provides that a power automatically expires seven years after the date of its execution. OR. REV. STAT. § 127.530 (1991); *id.* § 127.515(1)(b) (date required). The seven-year limit protects principals who may have a change of heart between the date of execution and the date of need. On the other hand, a less than vigilant principal may end up with no power at all.

Some of the other miscellaneous execution requirements include: disqualification of creditors as witnesses, N.C. GEN. STAT. § 32A-16(6) (1991); N.D. CENT. CODE § 23-06.5-05 (1991); TEX. CIV. PRAC. & REM. CODE ANN. § 135.004(b)(5) (West Supp. 1992); VT. STAT. ANN. tit. 14, § 3456 (1989); WIS. STAT. ANN. § 155.10(2)(b) (West Supp. 1991); disqualification as witnesses of persons who are financially responsible for the principal's care, KAN. STAT. ANN. § 58-629(e)(1) (Supp. 1991); W. VA. CODE § 16-30A-6(b)(4) (1991); WIS. STAT. ANN. § 155.10(2)(c) (West Supp. 1991); and a requirement that the agent sign an acceptance of appointment, N.D. CENT. CODE § 23-06.5-06 (1991); OR. REV. STAT. § 127.525 (1991).

¹⁶⁶ For example, the Oregon warning, which is entitled just that, starts off: "This is an important legal document. It creates a power of attorney for health care. Before signing this document, you should know these important facts. . . ." OR. REV. STAT. § 127.530 (1991). It continues by delineating the authority and duties of the agent, the execution requirements, the duration of the power, and the principal's right of revocation. *Id.* It concludes by suggesting that an attorney be consulted if questions arise. *Id.*

¹⁶⁷ The declared purpose of the Illinois Powers of Attorney for Health Care Law, among other things, is to provide a statutory form so that "health care providers and other third parties who rely in good faith on the acts and decisions of the agent within the scope of the power may do so without fear of civil or criminal liability to the principal, the State or any other person." ILL. ANN. STAT. ch. 110 1/2, para. 804-1 (Smith-Hurd Supp. 1992). A similar statement is included in the Georgia statute. See GA. CODE ANN. § 31-36-2(c) (Michie 1991). Despite the declared purpose of their statutes, however, both Georgia and Illinois made their statutory forms entirely optional. See *id.* § 31-36-10(a); ILL. ANN. STAT. ch. 110 1/2, para. 804-10(a) (Smith-Hurd Supp. 1992).

the rigid form requirements provide much advantage.¹⁶⁸

The witnessing and ceremonial requirements may impress the principal with the seriousness of the document¹⁶⁹ and provide some assurance that the principal has capacity at the time of execution.¹⁷⁰ If one draws an analogy to the law of wills, the requirements also may have been designed to limit the use of informal documents and statements not made with the requisite intent, to allow the principal some independence of thought, and to prevent the use of witnesses who might be placed in a conflict of interest.¹⁷¹

¹⁶⁸ For an example of a sophisticated attorney-prepared durable power for health care, see Collin, *supra* note 117, ¶ 505.5 (analysis of a sample form). Quality forms are not limited to private attorneys. The California Medical Association, for example, has produced a form that is far more comprehensive than its statutory counterpart. Compare the form in CAL. CIV. CODE § 2500 (West, Supp. 1991) with CAL. MED. ASS'N, *Durable Power of Attorney for Health Care*, reprinted in Collin, *supra* note 117, ¶ 509. See also A.B.A. COMM'N ON LEGAL PROBLEMS OF THE ELDERLY, HEALTH CARE POWERS OF ATTORNEY: AN INTRODUCTION AND SAMPLE FORM (1990); FRANCIS J. COLLIN, JR. ET AL., DRAFTING THE DURABLE POWER OF ATTORNEY: A SYSTEMS APPROACH (Albert L. Moses & John J. Lombard, Jr. eds., 2d ed. 1992).

¹⁶⁹ The President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, in its ground-breaking study, *Making Health Care Decisions*, concurred with the view that a patient, in executing a durable power or living will, should give due regard to the step being taken. The President's Commission concluded, however, that the best way to accomplish this objective is not by ceremony or ritual, but by requiring the health care provider to explain the document's probable consequences. See 1 PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, MAKING HEALTH CARE DECISIONS 160-61 (1982) [hereinafter PRESIDENT'S COMM'N].

¹⁷⁰ The President's Commission noted, "[t]here should be some way to establish that a person filling out a directive (the principal) was legally competent to do so at the time." PRESIDENT'S COMM'N, *supra* note 169, at 160. The American College of Probate Counsel (now the American College of Trust and Estate Counsel) has opined that this objective can best be accomplished by requiring witnesses and an attestation clause. The College, however, saw no need for witness eligibility rules. See *Report of the State Laws Committee on the Use of Durable Powers of Attorney for Health Care Decisions*, 15 PROB. NOTES 89, 90 (1989).

¹⁷¹ The purposes of the execution requirements for an ordinary attested will are to make certain that the testator's statements were made with the requisite intent, to increase the reliability of the proof, and, by requiring that the witnesses be

Those objectives are at least partially misplaced. Although a family member may not witness, a family member is the one most likely to be called upon to act as agent, a position in which the potential for conflict of interest is even greater.¹⁷² Moreover, by making the power more difficult to execute, the requirements inhibit rather than facilitate the use of the durable power device, thereby placing more individuals in the uncertainty that the durable power device is supposed to prevent.¹⁷³

2. Revocation

A primary goal of a revocation provision is to carry out the principal's intent. Consequently, one might assume that revocation should be permitted by any means, formal or informal, through which the principal makes known this intent. On the other hand, ease of revocation increases the risk of inadvertent revocation. Thus, some degree of formality may be beneficial to forestall questions regarding the reliability of proof and the finality of the principal's decision.¹⁷⁴

disinterested, to guard the testator against undue influence and other forms of imposition. See Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 3-13 (1941).

¹⁷² "Every recent survey that we have found indicates that society believes that a patient's family members should function as his or her surrogate decisionmakers." *In re Jobes*, 529 A.2d 434, 446 n.11 (N.J. 1987) (citing surveys with family preference ratings of from 64% to 84%). The potential conflict of interest of placing a family member in a decisionmaking role has not gone unnoticed, however. See, e.g., *John F. Kennedy Memorial Hosp. v. Bludworth*, 432 So. 2d 611, 618 (Fla. Dist. Ct. App. 1983), *rev'd on other grounds*, 452 So. 2d 921 (Fla. 1984): "One need not go so far back in history as Cain and Abel to recognize that the interests of various family members are not always synonymous nor even harmonious. The newspaper is a daily reminder that murderers are often related to their victims."

¹⁷³ In the absence of an effective designation of an agent, the health care provider may insist on court approval, request that a guardian be appointed, or look to the family, either as a matter of custom or, on occasion, with case law or statutory support. For a discussion of the various options, see MEISEL, *supra* note 7, §§ 8.14-.32.

¹⁷⁴ For a complete discussion of some of these arguments within the context of living wills, see Leslie Pickering Francis, *The Evanescence of Living Wills*, 24 REAL PROP. PROB. & TR. J. 141, 152-55, 160-64 (1989); Gelfand, *supra* note 138, at 765-68.

The arguments supporting heightened formalities have not been followed. Statutory form durable powers for health care may be hard to execute, but they are easy to revoke. That ease of revocation has become the norm should not be surprising. Ease of revocation is one of the staples of the law of agency.¹⁷⁵ Furthermore, ease of revocation is common among the living will statutes, from which much of the wording in the health care statutes is patterned.¹⁷⁶

All of the statutes, of course, either expressly or impliedly permit revocation by subsequent writing, including execution of a subsequent power.¹⁷⁷ Oral revocations are authorized,¹⁷⁸ and a substantial minority of the statutes apparently permit revocation by behavior that manifests an intent to revoke,¹⁷⁹ including, in several

Professor Gelfand is particularly concerned about the abuse of informal statements. He notes the following:

Physicians faced with reports of oral statements that may or may not be revocations cannot say for certain whether the statements were actually made, whether the words used were a sufficiently clear expression of an intent to revoke, or whether clearly stated words were intended as the patient's final expression.

Id. at 768.

¹⁷⁵ An agency is revoked by written or spoken words or other conduct which, reasonably interpreted, indicate that the principal no longer consents to have the agent act. An agreement that the authority be revoked only in a particular manner is ineffective. RESTATEMENT (SECOND) OF AGENCY § 119 cmt. a (1957).

¹⁷⁶ Professor Gelfand notes that of 39 living will statutes surveyed, 10 permit revocation by any means that communicates the necessary intent, and 24 others specifically permit revocation by oral statement. Gelfand, *supra* note 138, at 767 & nn.116-17.

¹⁷⁷ Only Georgia and Illinois do not specifically provide that execution of a subsequent power revokes an earlier power. A subsequent power, however, would most likely be deemed an amendment that totally supersedes the earlier power. Georgia and Illinois, unlike the other jurisdictions, specifically provide that a principal may amend a power. See GA. CODE ANN. § 31-36-6(d) (Michie 1991); ILL. ANN. STAT. ch. 110½, para. 804-6(b) (Smith-Hurd Supp. 1992).

¹⁷⁸ The only exceptions are Idaho, Kansas, and North Carolina. They do not necessarily prohibit oral revocation. They simply fail to mention it as an option.

¹⁷⁹ GA. CODE ANN. § 31-36-6(a)(3) (Michie 1991) (oral or any other expression of intent to revoke the agency); ILL. ANN. STAT. ch. 110½, para. 804-6(a)(3) (Smith-Hurd Supp. 1992) (same); IOWA CODE ANN. § 144B.8(1) (West Supp. 1992) (any manner by which the principal is able to communicate the intent to revoke); N.H.

cases, the traditional revocation by physical destruction.¹⁸⁰ In addition, a substantial minority of the statutes waive, at least in part, the requirement of capacity. The most aggressive provide that the principal may revoke a power regardless of his or her mental state.¹⁸¹ Moderate statutes provide that the principal's capacity is

REV. STAT. ANN. § 137-J:6(I)(a) (Supp. 1991) (oral or written notification, or by any other act evidencing a specific intent to revoke); N.Y. PUB. HEALTH LAW § 2985(1)(a) (McKinney Supp. 1991) (orally or in writing or by any other act evidencing a specific intent to revoke the proxy); N.C. GEN. STAT. § 32A-20(b) (1991) (any manner by which the principal is able to communicate an intent to revoke); N.D. CENT. CODE § 23-06.5-07 (1991) (orally, or in writing, or by any other act evidencing a specific intent to revoke); OR. REV. STAT. § 127.545(1) (1991) (any manner in which the principal is able to communicate the intent to revoke); TEX. CIV. PRAC. & REM. CODE ANN. § 135.005(a)(1) (West Supp. 1992) (oral or written notification, or by any other act evidencing a specific intent to revoke); VT. STAT. ANN. tit. 14, § 3457(a)(1) (1989) (orally, or in writing, or by any other act evidencing a specific intent to revoke). The same result should be reached in the other jurisdictions, assuming that general agency principles supplement their statutes. Under agency law, a power may be revoked by conduct that is inconsistent with the continuation of the agent's authority. *See supra* note 175.

¹⁸⁰ GA. CODE ANN. § 31-36-6(a)(1) (Michie 1991) (by being obliterated, burned, torn, or otherwise destroyed or defaced in a manner indicating intention to revoke); ILL. ANN. STAT. ch. 110 1/2, para. 804-6(a)(1) (Smith-Hurd Supp. 1992) (similar); KY. REV. STAT. ANN. § 311.976 (Michie/Bobbs-Merrill Supp. 1991) (by destruction of the document); W. VA. CODE § 16-30A-13(a) (1991) (by destruction thereof); WIS. STAT. ANN. § 155.40(1)(a) (West Supp. 1991) (canceling, defacing, obliterating, burning, tearing, or other destruction). *Cf.* UNIF. PROBATE CODE § 2-507, 8 U.L.A. 122 (1983) (will or any part thereof is revoked by burning, tearing, canceling, obliterating, or other destruction made with revocatory intent). For a detailed discussion of the various forms of annihilation, see WILLIAM J. BOWE & DOUGLAS H. PARKER, *PAGE ON THE LAW OF WILLS* §§ 21.4-.15 (1960 & Supp. 1990). Professor Gelfand has determined that 24 of the living will statutes provide for revocation by physical destruction. Gelfand, *supra* note 138, at 767 & n.117.

¹⁸¹ *See* GA. CODE ANN. § 31-36-6(a) (Michie 1991) (without regard to principal's mental or physical condition); ILL. ANN. STAT. ch. 110½, para. 804-6(a) (Smith-Hurd Supp. 1992) (same); OR. REV. STAT. § 127.545(1) (1991) (same); TEX. CIV. PRAC. & REM. CODE ANN. § 135.005(a)(1) (West Supp. 1992) (without regard to principal's mental state, competency, or capacity to make health care decisions). Twenty-three of the living will statutes also allow revocation without regard to the declarant's mental state or capacity. Gelfand, *supra* note 138, at 766 n.113.

presumed.¹⁸² Several others, by their silence, also may have waived the capacity requirement.¹⁸³ Finally, many of the statutes protect a provider acting in good faith without actual knowledge of a revocation.¹⁸⁴

Safeguards have not been forgotten, however. An oral or written revocation usually is not effective until delivered or communi-

¹⁸² See CAL. CIV. CODE § 2437(c) (West Supp. 1991) (adds that presumption affects the burden of proof); D.C. CODE ANN. § 21-2208(c) (1989) (similar addition); N.Y. PUB. HEALTH LAW § 2985(1)(b) (McKinney Supp. 1991). Iowa employs both standards. A principal may revoke a power without regard to physical or mental condition and a principal's capacity to revoke is presumed. See IOWA CODE ANN. § 144B.8 (West Supp. 1992).

¹⁸³ Only Kentucky and North Carolina explicitly require that a principal have capacity in order to revoke a power. See KY. REV. STAT. ANN. § 311.976 (Michie/Bobbs-Merrill Supp. 1990) (grantor must have decisional capacity); N.C. GEN. STAT. § 32A-20(b) (1991) (principal must be capable of making and communicating health care decision).

¹⁸⁴ See CAL. CIV. CODE § 2437(f) (West Supp. 1991); GA. CODE ANN. § 31-36-8(5) (Michie 1991); IOWA CODE ANN. § 144B.8(4) (West Supp. 1992); KAN. STAT. ANN. § 58-628 (Supp. 1991); N.C. GEN. STAT. § 32A-24(a) (1991); OR. REV. STAT. § 127.545(6) (1991); TEX. CIV. PRAC. & REM. CODE ANN. § 135.010(c)(2) (West Supp. 1992); W. VA. CODE §§ 16-30A-9, -10(a) (1991) (if agent presents affidavit of nonrevocation); WIS. STAT. ANN. § 155.50(1)(c) (West Supp. 1991).

The protection of a provider who proceeds without actual knowledge of a revocation is part of a broader system designed to encourage an agent to use the delegated authority and to encourage compliance on the part of health care providers. For example, an agent is protected in a number of jurisdictions for actions taken or health care decisions made in good faith. See GA. CODE ANN. § 31-36-8(4) (Michie 1991); ILL. ANN. STAT. ch. 110½, para. 804-8(d) (Smith-Hurd Supp. 1992); IOWA CODE ANN. § 144B.9(3) (West Supp. 1992); N.H. REV. STAT. ANN. § 137-J:11(I) (Supp. 1991); N.Y. PUB. HEALTH LAW § 2986(2) (McKinney Supp. 1991); N.D. CENT. CODE § 23-06.5-12(1) (1991); OR. REV. STAT. § 127.555(2) (1991); TEX. CIV. PRAC. & REM. CODE ANN. § 135.010(a) (West Supp. 1992); VT. STAT. ANN. tit. 14, § 3462(a) (1989); WIS. STAT. ANN. § 155.50(3) (West Supp. 1991). Furthermore, a majority of the statutes protect a health care provider for good faith reliance on an agent's directions. See CAL. CIV. CODE § 2438(a) (West Supp. 1991); GA. CODE ANN. § 31-36-8 (Michie Supp. 1990); ILL. ANN. STAT. ch. 110½, para. 804-8 (Smith-Hurd Supp. 1990); IOWA CODE ANN. § 144B.9(1) (West Supp. 1992); N.H. REV. STAT. ANN. § 137-J:11(II) (Supp. 1991); N.Y. PUB. HEALTH LAW § 2986(1) (McKinney Supp. 1991); N.C. GEN. STAT. § 32A-24(b) (1991); N.D. CENT. CODE § 23-06.5-12(2) (1991); OR. REV. STAT. § 127.555(3) (1991); TEX. CIV. PRAC. & REM. CODE ANN. § 135.010(b) (West Supp. 1992); VT. STAT. ANN. tit. 14, § 3462(b) (1989); W. VA. CODE § 16-30A-10(a) (1991).

cated to the agent or health care provider, although sometimes delivery is required only if the objective is to revoke a particular agent's designation or authority, not to revoke the power itself.¹⁸⁵ In addition, several statutes require that a witness reduce an oral revocation to writing¹⁸⁶ or, in the alternative, that an oral revocation be witnessed by two persons.¹⁸⁷ Furthermore, to effectuate a principal's presumed intent, a substantial majority of the statutes provide that the designation of the principal's spouse as agent will be revoked by divorce.¹⁸⁸

¹⁸⁵ See CAL. CIV. CODE § 2437(a) (West Supp. 1991) (revocation of agent's appointment upon oral or written notice to agent; revocation of agent's authority upon oral or written notice to health care provider); D.C. CODE ANN. § 21-2208(a) (1989) (same); IOWA CODE ANN. § 144B.8(1) (West Supp. 1992) (revocation may be made by notifying agent or health care provider orally or in writing); NEV. REV. STAT. ANN. § 449.830 (Michie 1991) (same as California); N.H. REV. STAT. ANN. § 137-J:6(I)(a) (Supp. 1991) (power revoked by written or oral notice to agent or health or residential care provider); N.Y. PUB. HEALTH LAW § 2985(1)(a) (McKinney Supp. 1991) (power revoked upon written or oral notice to agent or health care provider); N.C. GEN. STAT. § 32A-20(b) (1991) (revocation effective upon communication to agent and attending physician); N.D. CENT. CODE § 23-06.5-07(1) (1991) (power revoked upon notice to agent or health care or long-term care services provider); OR. REV. STAT. § 127.545(1) (1991) (revocation effective upon communication to attending physician or health care provider, or to agent who must promptly inform the attending physician); R.I. GEN. LAWS § 23-4.10-2 (1989) (revocation of agent's authority upon oral or written notice to agent or to treating doctor, hospital, or other health care provider); TEX. CIV. PRAC. & REM. CODE ANN. § 135.005(a)(1) (West Supp. 1992) (revocation upon oral or written notice to agent or to health or residential care provider); VT. STAT. ANN. tit. 14, § 3457(a)(1) (1989) (same); W. VA. CODE § 16-30A-13 (1991) (written or oral revocation effective upon communication to attending physician). Notification is also a familiar requirement under the living will statutes. Most provide that a verbal or written revocation is not effective until communicated to the attending physician. See MEISEL, *supra* note 7, § 11.18, at 372.

¹⁸⁶ See GA. CODE ANN. § 31-36-6(a)(3) (Michie 1991) (within 30 days); ILL. ANN. STAT. ch. 110½, para. 804-6(a)(3) (Smith-Hurd Supp. 1992) (no time limit specified); W. VA. CODE § 16-30A-13(c) (1991) (contemporaneously).

¹⁸⁷ See WIS. STAT. ANN. § 155.40(1)(c) (West Supp. 1991).

¹⁸⁸ Statutory provisions that revoke a former spouse as agent vary widely in their details and reflect similar variation found in state statutes on the effect of a divorce or other marital dissolution on a spouse's rights under a will. The most drastic revoke the power itself. See IOWA CODE ANN. § 144B.12(3) (West Supp. 1992) (dissolution of marriage); N.D. CENT. CODE § 23-06.5-07(c) (1991) (divorce); OR.

In contrast to their responsiveness to a principal's efforts to revoke a power, many health care statutes do not adequately address another means by which a power is sometimes revoked, the revocation by a guardian. Instead of recognizing the qualitative difference between a health care power and a property power, the statutes allow their property power provisions to control by default. The health care power is either automatically revoked upon a guardian's appointment¹⁸⁹ or the guardian may revoke the power following the appointment.¹⁹⁰ Nevertheless, under a health care power, honoring the principal's express wishes, as interpreted by the agent, is more important than under a property power, especially when matters of

REV. STAT. § 127.545(5) (1991) (dissolution of marriage or annulment); TEX. CIV. PRAC. & REM. CODE ANN. § 135.005(a)(3) (West Supp. 1992) (divorce); VT. STAT. ANN. tit. 14, § 3457(a)(3) (1989) (divorce); WIS. STAT. ANN. § 155.40(2) (West Supp. 1990) (divorce or annulment). The most obscure provide that upon divorce or legal separation, the spouse is deemed to have died. See ILL. ANN. STAT. ch. 110½, para. 802-6(b) (Smith-Hurd Supp. 1992) (general provision applicable to all types of powers of attorney). The most advanced revoke the spouse's designation, not the power itself, but revive the designation in the event of remarriage. See CAL. CIV. CODE § 2437(e) (West Supp. 1992) (dissolution of marriage or annulment); D.C. CODE ANN. § 21-2208(e) (1989) (same). Another variant is to revoke the power, but if an alternate agent is named, to only revoke the spouse's designation. See N.H. REV. STAT. ANN. § 137-J:6(I)(c) (Supp. 1991) (divorce); N.C. GEN. STAT. § 32A-20(c) (1991) (divorce or legal separation). The simplest merely remove the spouse as agent or revoke the spouse's designation. See GA. CODE ANN. § 31-36-6(b) (Michie 1991) (dissolution of marriage or annulment); IDAHO CODE § 39-4505 (Supp. 1992) (dissolution of marriage); NEV. REV. STAT. ANN. § 449.860(2) (Michie 1991) (divorce); N.Y. PUB. HEALTH LAW § 2985(1)(e) (McKinney Supp. 1992) (divorce or legal separation); R.I. GEN. LAWS § 23-4.10-2 (1989) (dissolution of marriage); W. VA. CODE § 16-30A-13(d) (1991) (divorce).

¹⁸⁹ N.C. GEN. STAT. § 32A-22(a) (1991). Although its health care statute is silent, the general durable power statute in Kentucky provides that the appointment of a guardian automatically revokes a power. See KY. REV. STAT. ANN. § 386.093 (Michie/Bobbs-Merrill 1984).

¹⁹⁰ Kansas has so provided in its durable power for health care statute, however, the provision is taken almost verbatim from its general durable power statute. Compare KAN. STAT. ANN. § 58-627(a) (Supp. 1991) (health care power) with *id.* § 58-612(a) (1983) (general durable power). Several other jurisdictions have granted guardians the right in their general durable power provisions. See, e.g., D.C. CODE ANN. § 21-2083(a) (1989); IDAHO CODE § 15-5-503(1) (Supp. 1992); NEV. REV. STAT. ANN. § 111.460 (Michie 1986); R.I. GEN. LAWS § 34-22-6.1 (1984).

life or death are involved.¹⁹¹ Arguably, to recognize those preferences, revocation by a guardian should not be automatic. Some justification should be required.

Fortunately, several states require the proper level of justification. Solutions include granting a preference to the agent to act as guardian,¹⁹² and requiring that the guardian petition the court to revoke the power¹⁹³ or remove the agent.¹⁹⁴ These solutions are

¹⁹¹ No durable power, no matter how detailed, can possibly anticipate every situation that may arise. Nor should it. Drafting flexible guidelines permits an agent to respond to unforeseen circumstances with reference to the principal's value system and with knowledge of the principal's probable preferences. This ability to appoint a person who is familiar with the patient's value system and preferences is one of the principal benefits of the durable power for health care. A guardian, due to unfamiliarity, may simply be unable to make the same level of qualitative decision. See John J. Lombard, Jr., *The Incompetent Patient's Right to Refuse or Terminate Treatment*, in REFUSAL OR TERMINATION OF MEDICAL TREATMENT: WHO DECIDES? ch. D, at 29-30 (1990) (program materials for seminar presented at 1990 annual meeting of the American Bar Association).

¹⁹² See W. VA. CODE § 16-30A-4(e) (Supp. 1990); WIS. STAT. ANN. § 880.33(5) (West 1991) (guardianship provision). Both provisions appear to eliminate the necessity of nominating the agent as guardian in the power. However, such nomination is still desirable to clarify the principal's intent.

¹⁹³ California and Oregon allow judicial revocation upon a finding that, among other things, the agent is unfit, the agent has not acted consistently with the principal's desires, or the agent has not acted in the principal's best interests. See CAL. CIV. CODE § 2412.5 (West Supp. 1991); OR. REV. STAT. § 127.550 (1991). Wisconsin provides that the appointment of a guardian automatically revokes a power unless a court determines that the power should continue in effect. See WIS. STAT. ANN. § 155.60(2) (West Supp. 1991).

¹⁹⁴ New York authorizes a guardian to petition for judicial removal of an agent. N.Y. PUB. HEALTH LAW § 2992 (McKinney Supp. 1991). New Hampshire, Texas, and Vermont provide that the court, upon petition of a guardian, may suspend or terminate an agent's powers. N.H. REV. STAT. ANN. § 137-J:12 (Supp. 1991); TEX. CIV. PRAC. & REM. CODE ANN. § 135.006 (West Supp. 1992); VT. STAT. ANN. § 3463(a) (1989). Georgia and Illinois require a court order before a guardian may exercise any of the principal's powers, including the power to revoke the instrument or remove the agent. See GA. CODE ANN. § 31-36-6(c) (Michie 1991); ILL. ANN. STAT. ch. 110½, paras. 802-5, -10 (Smith-Hurd Supp. 1992). Iowa provides that an agent has priority over a guardian unless the court finds that the agent is acting contrary to the principal's wishes. IOWA CODE ANN. § 144B.6(1) (West Supp. 1992). North Dakota provides that an agent has priority unless a court determines

then supplemented by the best defense against a guardian's attack, clear mention in the statutory form of the option of nominating the agent as guardian.¹⁹⁵

3. *Who May Act As Agent*

Conflicts of interest abound in estates and trusts practice. Fiduciaries frequently have beneficial interests that are adverse to the interests of other beneficiaries or a fiduciary may be involved on both sides of a transaction. This potential for conflict applies fully to agents acting under durable powers. For example, the agent may be a joint tenant with the principal or may benefit from a gift program.¹⁹⁶ Similarly, the execution of a power may offer the agent an increased opportunity to exercise undue influence.¹⁹⁷

The law has developed a number of remedies for persons aggrieved by an agent's misuse of trust.¹⁹⁸ As to property powers, the remedies have not included the disqualification of certain classes

otherwise. N.D. CENT. CODE § 23-06.5-13(1) (1991).

¹⁹⁵ See CAL. CIV. CODE § 2500 (West Supp. 1991); GA. CODE ANN. § 31-36-10(a) (Michie 1991); ILL. ANN. STAT. ch. 110 1/2, para. 804-10(a) (Smith-Hurd Supp. 1992); N.C. GEN. STAT. § 32A-25 (1991). For a discussion of some of the reasons for nominating the agent as guardian, see *supra* note 19. For the comparable provisions under the statutory short-forms, see *supra* note 64 and accompanying text.

¹⁹⁶ See, e.g., *In re Estate of Rogers*, 725 P.2d 544 (Mont. 1986) (wife, as agent under durable power granted by husband, assigned notes and deeds of trust from her husband to herself).

¹⁹⁷ Conversely, granting a power may make it more difficult for others to exert undue influence. See, e.g., *In re Estate of Till*, 458 N.W.2d 521 (S.D. 1990) (friend who received bulk of estate under will arranged to have family member dismissed as agent).

¹⁹⁸ An agent is held to the standards of a trustee. Like a trustee, an agent owes the principal a duty of loyalty. An agent must act solely for the benefit of the principal, must account for profits, may not take an adverse position without the principal's knowledge, and must deal fairly with the principal and disclose all relevant facts. Upon a breach by an agent, the principal may bring an action for damages or equitable relief, including the removal of the agent. See generally RESTATEMENT (SECOND) OF AGENCY §§ 387-399 (1957).

of persons from acting as agent.¹⁹⁹ Disqualification is, however, a prominent feature of the statutory form health care powers. Generally, health care providers, nursing home operators, and their employees may not be designated as agent.²⁰⁰

This result may be attributable, in part, to the doctrine of informed consent, a doctrine that emphasizes a patient's right to self-determination. To effectuate that right, the patient is entitled to a full disclosure of risks and alternatives, putting the patient in a better position for making an informed decision as to how to proceed. If a patient lacks the capacity to express health care preferences, the patient's role is transferred to a surrogate who must follow the patient's previously expressed preferences.²⁰¹ The proper role of a health care provider, however, is to make recommendations as to appropriate care, recommendations that may or may not be consistent with the patient's preferences.

To prevent a hopeless conflict between a provider's duty and a patient's possibly inconsistent preferences,²⁰² a variety of agent

¹⁹⁹ Missouri is an exception. See *supra* note 40. Missouri also has enacted a detailed code of fiduciary conduct. See *supra* note 41.

²⁰⁰ For an analysis of the statutes, see *infra* notes 203-10 and accompanying text. In general, the other types of durable power for health care statutes do not address agent qualifications. Virginia and Washington are among the exceptions. See *supra* notes 121-22.

²⁰¹ For a comprehensive discussion of the ethical and legal basis for the doctrine of informed consent and the role of the surrogate, see PAUL S. APPLEBAUM ET AL., INFORMED CONSENT chs. 2, 5 (1987). The obligation to follow a patient's express preferences or values is not absolute. Countervailing state interests include the preservation of life, the prevention of suicide, the protection of third parties, and the protection of professional ethics. See MEISEL, *supra* note 7, §§ 4.13-16, at 100-06.

²⁰² See Paul B. Solnick, *Proxy Consent for Incompetent Non-Terminally Ill Adult Patients*, 6 J. LEGAL MED. 1, 16-17 (1985) (footnote omitted):

Since patients have the right to refuse their physicians' proposed treatment or procedures and to accept alternative forms of treatment which may not be as acceptable to their physicians, this right would tend to be negated if physicians, with their bias toward health care, were placed in the position of making proxy decisions on behalf of incompetent patients. This would contravene the patient's right of autonomy and self-determi-

disqualification provisions have been enacted, including a ban against the attending physician and the physician's employees,²⁰³ disqualification of individuals affiliated with health care institutions,²⁰⁴ and, most commonly, a prohibition against all treating health care providers and their employees.²⁰⁵ A majority of the statutes, however, permit as agents family members who coincidentally happen

nation.

²⁰³ N.Y. PUB. HEALTH LAW § 2981(3)(c) (McKinney Supp. 1992) (attending physician); OR. REV. STAT. § 127.520(1) (1990) (attending physician and employees).

²⁰⁴ KAN. STAT. ANN. § 58-629(d) (Supp. 1991) (employees, owners, directors, and officers of facility); KY. REV. STAT. ANN. § 311.972(3) (Michie/Bobbs-Merrill Supp. 1991) (employees, owners, directors, or officers of health care facility in which principal is a resident or patient); NEV. REV. STAT. ANN. § 449.820 (Michie Supp. 1989) (operators and employees of health care facilities); N.Y. PUB. HEALTH LAW § 2981(3)(a) (McKinney Supp. 1992) (operators, administrators or employees of hospital in which principal is a patient or has applied for admission); OR. REV. STAT. § 127.520(2) (1991) (owners, operators and employees of health care facility in which principal is a patient or resident); W. VA. CODE § 16-30A-6(c) (1991) (operators and employees of health care facility serving the principal); WIS. STAT. ANN. § 155.05(3) (West Supp. 1991) (employees of health care facility in which principal is a patient or resident, and spouses of those employees). For provisions directed specifically at nursing home operators and employees, see *infra* note 209 and accompanying text.

²⁰⁵ CAL. CIV. CODE § 2432(b) (West Supp. 1992) (treating health care providers and employees); D.C. CODE ANN. § 21-2209 (1989) (health care providers who request principal to execute power); GA. CODE ANN. §§ 31-36-3(4), -5(b) (Michie Supp. 1990) (health care providers and their employees and agents who are directly or indirectly involved in principal's health care); IDAHO CODE § 39-4505 (Supp. 1992) (treating health care providers and employees); ILL. ANN. STAT. ch. 110½, paras. 804-4(d), -5 (Smith-Hurd Supp. 1991) (attending physician and treating health care providers); IOWA CODE ANN. § 144B.4 (West Supp. 1992) (health care providers and employees of health care providers attending the principal); KAN. STAT. ANN. § 58-629(d) (Supp. 1991) (treating health care providers and employees); NEV. REV. STAT. ANN. § 449.820 (Michie Supp. 1989) (principal's health care providers and employees); N.H. REV. STAT. § 137-J:4 (Supp. 1991) (same); N.C. GEN. STAT. § 32A-18 (1991) (persons providing health care to principal for remuneration); N.D. CENT. CODE § 23-06.5-04 (1991) (principal's health care providers and employees); R.I. GEN. LAWS § 23-4.10-2 (1989) (treating health care providers and employees); TEX. CIV. PRAC. & REM. CODE ANN. § 135.003 (West Supp. 1992) (principal's health care providers and employees); VT. STAT. ANN. tit. 14, § 3455 (1989) (same); W. VA. CODE § 16-30A-6(c) (1991) (treating health care providers and employees); WIS. STAT. ANN. § 155.05(3) (West Supp. 1991) (principal's health care providers and employees and their spouses).

to be employees.²⁰⁶ Apparently, state legislatures assume that a family member will have sufficient independence of judgment from the health care provider or employer, or believe that the importance of satisfying the desire of most principals to name a family member as agent outweighs the possible risks.²⁰⁷

As was the case with execution requirements,²⁰⁸ the statutes also reflect a concern over possible patient abuse. For example, a majority of the jurisdictions prohibit the operators of nursing homes and nonfamily employees from being designated agents.²⁰⁹ A majority also prohibit health care facilities from requiring the execution of a power as a condition for admission.²¹⁰

²⁰⁶ CAL. CIV. CODE § 2432.5 (West Supp. 1992); IDAHO CODE § 39-4505 (Supp. 1990); IOWA CODE ANN. § 144B.4 (West Supp. 1992); KAN. STAT. ANN. § 58-629(d)(1) (Supp. 1991); KY. REV. STAT. ANN. § 311.972(3) (Michie/Bobbs-Merrill Supp. 1990); NEV. REV. STAT. § 449.820(2) (Michie 1991); N.H. REV. STAT. ANN. § 137-J:4 (Supp. 1991); N.Y. PUB. HEALTH LAW § 2981(3)(b)(i) (McKinney Supp. 1992); N.D. CENT. CODE § 23-06.5-04 (1991); OR. REV. STAT. § 127.520 (1991); R.I. GEN. LAWS § 23-4.10-2 (1989); TEX. CIV. PRAC. & REM. CODE ANN. § 135.003 (West Supp. 1992); VT. STAT. ANN. tit. 14, § 3455 (1989); W. VA. CODE § 16-30A-6(c) (1991); WIS. STAT. ANN. § 155.05(3) (West Supp. 1991).

²⁰⁷ See *supra* note 172 and accompanying text.

²⁰⁸ See *supra* notes 156-59 and accompanying text.

²⁰⁹ See CAL. CIV. CODE § 2432(b)(1) (West Supp. 1992) (community care facilities, residential care facilities for the elderly); IDAHO CODE § 39-4505 (Supp. 1990) (community care facilities); KAN. STAT. ANN. § 58-629(a)(2), (d) (Supp. 1989) (hospitals, psychiatric hospitals and treatment facilities, hospices, and nursing homes); N.H. REV. STAT. ANN. § 137-J:4 (Supp. 1991) (residential care providers); N.D. CENT. CODE § 23-06.5-04 (1991) (long-term care services providers); R.I. GEN. LAWS § 23-4.10-2 (1989) (community care facilities); TEX. CIV. PRAC. & REM. CODE ANN. § 135.003 (West Supp. 1992) (residential care providers); VT. STAT. ANN. tit. 14, § 3455 (1989) (same). This list is not exhaustive. The statutes in a number of jurisdictions encompass various types of nursing homes within their definitions of "health care provider" or "health care facility." For a partial list, see *infra* note 221.

²¹⁰ See, e.g., CAL. CIV. CODE § 2441 (West Supp. 1991); D.C. CODE ANN. § 21-2209 (1989) (adds that health care facility may request execution commencing 48 hours after admission); KY. REV. STAT. ANN. § 311.984(3) (Michie/Bobbs-Merrill Supp. 1990) (general prohibition against requiring execution as condition for receiving health care); N.Y. PUB. HEALTH LAW §§ 2988, 2991 (McKinney Supp. 1991) (adds that residential health care and mental hygiene facilities must establish procedures to ensure the voluntary creation of proxies).

4. General Health Care Authority

A durable power for health care differs from a living will in several fundamental respects. Perhaps the most important difference is the class of treatment to which each is directed. A durable power for health care, unlike a living will, can be used as a method for implementing decisions for all types of health care, not just decisions regarding the withholding or withdrawing of life-sustaining treatment.²¹¹ This objective is most apparent in the provisions that authorize a principal to grant an agent all authority that the principal could have exercised were the principal not incapacitated.²¹² These general provisions, though, are only a starting point in illuminating both the scope of authority that the principal may grant and the consequent role of the agent.

The statutes, as their name implies, are directed at "health care," which is most commonly defined as "any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's

This prohibition against overreaching is directly traceable to the living will statutes, many of which prohibit a facility from requiring the execution of a living will as a condition for admission or for receiving care. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 7192(c) (West Supp. 1991).

²¹¹ For a discussion of some of the other differences, see *supra* note 117 and accompanying text. The statement in the text is a generalization which is not applicable in all jurisdictions. A number of the statutory form health care powers prohibit an agent from making certain types of health care decisions. *See infra* notes 224-26 and accompanying text.

²¹² *See, e.g.*, CAL. CIV. CODE § 2434(b) (West Supp. 1991); D.C. CODE ANN. § 21-2206(a) (1989); GA. CODE ANN. § 31-36-4 (Michie Supp. 1990); IDAHO CODE § 39-4505 (Supp. 1990); ILL. ANN. STAT. ch. 110 1/2, para. 804-3 (Smith-Hurd Supp. 1990); KY. REV. STAT. ANN. § 311.978(1) (Michie/Bobbs-Merrill Supp. 1990); OR. REV. STAT. § 127.535(1) (1991); R.I. GEN. LAWS § 23-4.10-2 (1989); TEX. CIV. PRAC. & REM. CODE ANN. § 135.002(a) (West Supp. 1992). Illinois, in addition, authorizes a principal to delegate the authority to make health care decisions for a minor child but did not design its statutory form to cover that possibility. *See* ILL. ANN. STAT. ch. 110½, paras. 804-3, -10(a) (Smith-Hurd Supp. 1990).

physical or mental condition."²¹³ This definition is then incorporated into "health care decision," which typically includes "consent, refusal of consent, or withdrawal of consent to health care."²¹⁴ These definitions are then carried into the forms, which, unless a principal otherwise specifies, authorize an agent to make all health care decisions that the principal could have made.²¹⁵

The agent, therefore, has authority to accept or reject the recommendations of treating professionals and to consent to medication and surgical procedures.²¹⁶ The selection of professionals and admission to or discharge from health care facilities is also covered, either by express provision²¹⁷ or by implication from other

²¹³ CAL. CIV. CODE § 2430(b) (West Supp. 1991). Substantive variations are found in Idaho, whose definition authorizes decisions as to physical condition only, IDAHO CODE § 39-4505 (Supp. 1990); Georgia, Illinois, and North Carolina which specifically encompass personal care within their definitions, GA. CODE ANN. § 31-36-3(2) (Michie Supp. 1990); ILL. ANN. STAT. ch. 110 1/2, para. 804-4(b) (Smith-Hurd Supp. 1990); N.C. GEN. STAT. § 32A-16(1) (1991); and Oregon, which refers to "disease, injury and degenerative conditions" instead of to "physical or mental condition," OR. REV. STAT. § 127.505(4) (1991).

²¹⁴ CAL. CIV. CODE § 2430(c) (West Supp. 1991). Wisconsin requires an "informed decision." WIS. STAT. ANN. § 155.01(5) (West Supp. 1991). Kentucky appears to severely limit the agent's authority to refuse treatment. It requires that the agent's decisions must be made in accordance with accepted medical practice. See KY. REV. STAT. ANN. § 311.978(1) (Michie/Bobbs-Merrill Supp. 1990).

²¹⁵ See, e.g., CAL. CIV. CODE § 2500 (West Supp. 1991). But see *infra* notes 224-26 and accompanying text for prohibited forms of consent.

²¹⁶ Only Georgia, Illinois, North Carolina, and West Virginia expressly authorize consent to medication and surgical procedures. See GA. CODE ANN. § 31-36-10(b)(1) (Michie Supp. 1990); ILL. ANN. STAT. ch. 110½, para. 804-10(b)(1) (Smith-Hurd Supp. 1990); N.C. GEN. STAT. § 32A-25 (1991); W. VA. CODE § 16-30A-4(d)(1) (Supp. 1990). Consent would nonetheless be authorized under the other statutes as a treatment for "an individual's physical or mental condition." See *supra* text accompanying notes 213-15.

²¹⁷ See CAL. CIV. CODE § 2504 (West Supp. 1992); D.C. CODE ANN. § 21-2206(a)(5) (1989); GA. CODE ANN. § 31-36-10(b)(2) (Michie Supp. 1990); ILL. ANN. STAT. ch. 110½, para. 804-10(b)(2) (Smith-Hurd Supp. 1990); KAN. STAT. ANN. § 58-629(a)(2) (Supp. 1991); N.C. GEN. STAT. § 32A-25 (1991); W. VA. CODE § 16-30A-4(d) (Supp. 1990).

statutory provisions.²¹⁸ The general definition of "health care," however, was not necessarily intended to include nursing home care, particularly care that is primarily custodial in nature.²¹⁹ Only a few states have directly tackled this issue.²²⁰ Other jurisdictions appear to authorize an agent to consent to nursing home care to varying extents,²²¹ but a careful drafter will add a special provision on this topic.²²² Like the statutory short-forms directed primarily at property management, all of the health care forms recognize that a principal may insert special provisions, desires, or limitations.²²³

²¹⁸ A competent person has the right to select treating professionals and to seek admission and discharge from health care facilities. An agent, therefore, is authorized to make those decisions for an incapacitated principal because the agent succeeds to all of the principal's authority. *See supra* note 215 and accompanying text.

²¹⁹ The comments to the MODEL HEALTH-CARE CONSENT ACT, the act from which the definitions of health care were derived, state that "health care" includes nursing care provided at a hospital but does not include routine care provided by the family at home. UNIF. LAW COMMISSIONERS' MODEL HEALTH-CARE CONSENT ACT § 1 cmt., 9 U.L.A. pt. 1, at 457-58 (1988). Where the line would be drawn between those two extremes is unclear.

²²⁰ Solutions include defining "health care" to include "personal care" in addition to granting agents authority to admit or discharge principals from nursing homes, GA. CODE ANN. §§ 31-36-3(2), -10(b)(2) (Michie Supp. 1990); ILL. ANN. STAT. ch. 110 1/2, paras. 804-4(b), -10(b)(2) (Smith-Hurd Supp. 1990); N.C. GEN. STAT. § 32A-16(1), -25 (1991), granting agents authority to make decisions as to home health care and care and treatment at nursing homes, W. VA. CODE § 16-30A-4(d)(1) (Supp. 1990), granting agents authority to make necessary arrangements at nursing homes, KAN. STAT. ANN. § 58-629(a)(2) (Supp. 1989), and prohibiting agents from approving more than a temporary stay at a nursing home absent specific authority in the power, WIS. STAT. ANN. § 155.20(2)(c)(2) (West Supp. 1991).

²²¹ This result is suggested in several jurisdictions, for example, by rather expansive definitions of "health care facility." *See, e.g.,* KY. REV. STAT. ANN. § 311.970(7) (Michie/Bobbs-Merrill Supp. 1990) (licensed nursing care facility); OR. REV. STAT. § 127.505(6) (1991) (residential care facilities, adult foster care homes, group care homes).

²²² The following provision has been suggested: "To make all necessary arrangements for me at any hospital, hospice, nursing home, convalescent home or similar establishment and to assure that all my essential needs are provided for at such a facility." Collin, *supra* note 117, ¶ 505.5(D).

²²³ *See* CAL. CIV. CODE § 2500 (West Supp. 1991); D.C. CODE ANN. § 21-2207 (1989); GA. CODE ANN. § 31-36-10(a) (Michie Supp. 1990); IDAHO CODE § 39-4505 (Supp. 1990); ILL. ANN. STAT. ch. 110 1/2, para. 804-10(a) (Smith-Hurd Supp. 1990);

Not all "health care decisions" can be delegated to an agent. Several statutes prohibit an agent from authorizing commitment to mental health facilities, the more invasive forms of mental health treatment, and sensitive reproduction matters.²²⁴ Some statutes also place substantial restrictions on an agent's ability to withdraw or withhold life-sustaining treatment, a topic that is discussed in the next section.²²⁵ Furthermore, a substantial majority of the jurisdictions

IOWA CODE ANN. § 144B.5 (West Supp. 1992); KAN. STAT. ANN. § 58-632 (Supp. 1989); KY. REV. STAT. ANN. § 311.980 (Michie/Bobbs-Merrill Supp. 1990); NEV. REV. STAT. ANN. § 449.830 (Michie Supp. 1989); N.H. REV. STAT. ANN. § 137-J:15 (Supp. 1991); N.Y. PUB. HEALTH LAW § 2981(5)(d) (McKinney Supp. 1990); N.C. GEN. STAT. § 32A-25 (1991); N.D. CENT. CODE § 23-06.5-17 (1991); OR. REV. STAT. § 127.530 (1991); R.I. GEN. LAWS § 23-4.10-2 (1989); TEX. CIV. PRAC. & REM. CODE ANN. § 135.016 (West Supp. 1992); VT. STAT. ANN. tit. 14, § 3466 (1991); W. VA. CODE § 16-30A-18 (Supp. 1990); WIS. STAT. ANN. § 155.30(3) (West Supp. 1992).

²²⁴ See CAL. CIV. CODE § 2435 (West Supp. 1991) (commitment or placement in mental health treatment facility, convulsive treatment, psychosurgery, sterilization, abortion); GA. CODE ANN. § 31-36-10(b)(1) (Michie Supp. 1990) (psychosurgery, sterilization, involuntary mental health hospitalization or treatment); NEV. REV. STAT. ANN. § 449.850 (Michie Supp. 1989) (commitment or placement in mental health treatment facility, convulsive treatment, psychosurgery, sterilization, abortion); N.H. REV. STAT. ANN. § 137-J:2(V) (Supp. 1991) (voluntary admission to state institution or voluntary sterilization); N.D. CENT. CODE § 23-06.5-03(5) (1991) (psycho-surgery, abortion, sterilization, or more than 45-day admission to mental health facility, state institution, or security unit of long-term care facility); OR. REV. STAT. § 127.540 (1991) (commitment or placement in mental health facility, convulsive treatment, psychosurgery, sterilization, abortion); TEX. CIV. PRAC. & REM. CODE ANN. § 135.002(f) (West Supp. 1992) (voluntary inpatient mental health services, convulsive treatment, psychosurgery, abortion); VT. STAT. ANN. tit. 14, § 3453(e) (1989) (voluntary admission to state institution or voluntary sterilization); WIS. STAT. ANN. § 155.20 (West Supp. 1991) (mental health hospitalization, experimental mental health research, psychosurgery, electroconvulsive treatment, other drastic mental health treatments). The extent to which authorization of such treatments is prohibited in the other jurisdictions, whether by separate statute, case law, or constitutional principle, is a topic well beyond the scope of this article. For a comprehensive discussion, see SAMUEL J. BRAKEL ET AL., *THE MENTALLY DISABLED AND THE LAW* (1985).

²²⁵ See *infra* text accompanying notes 245-52.

authorize an agent to make decisions only if the principal lacks capacity.²²⁶ At its worst, capacity is defined as the ability to communicate decisions rationally.²²⁷ At its best, it is defined in terms of the patient's level of understanding.²²⁸ Finally, a number of the statutes prescribe the procedure for determining capacity, although many add little to existing clinical practice.²²⁹

²²⁶ The principal exceptions are Georgia and Illinois. Under their statutory forms, an agent's authority commences upon execution unless the principal expressly provides otherwise. GA. CODE ANN. § 31-36-10(a) (Michie Supp. 1990); ILL. ANN. STAT. ch. 110½, para. 804-10(a) (Smith-Hurd Supp. 1992).

²²⁷ See IDAHO CODE § 39-4505 (Supp. 1990). A rationality standard is inappropriate because it suggests that a principal must conform to what society deems rational, and not to what may be best for the principal in light of the principal's values. A similar standard in the guardianship context, the ability to "make or communicate responsible decisions," has received like criticism. See ABA COMM'N ON THE MENTALLY DISABLED, COMM'N ON LEGAL PROBLEMS OF THE ELDERLY, GUARDIANSHIP: AN AGENDA FOR REFORM 15 (1989). The President's Commission also rejected a rationality standard. See PRESIDENT'S COMM'N, *supra* note 169, at 61, 174. For another example of a rationality test, see *supra* note 68.

²²⁸ Exactly what constitutes "capacity" has not received extensive judicial attention. The developing consensus, however, at least among commentators, is to define capacity in terms of a patient's ability to appreciate the nature, extent, and probable consequences of the proposed treatment. See MEISEL, *supra* note 7, § 2.17, at 32.

This evolving standard toward a test based on patient understanding is reflected in several of the health care statutes. For example, capacity has been defined as "the ability to understand and appreciate the nature and consequences of a health care decision, including the significant benefits and harms of and reasonable alternatives to any proposed health care." TEX. CIV. PRAC. & REM. CODE ANN. § 135.001(4) (West Supp. 1992); see also D.C. CODE ANN. § 21-2202(5) (1989); N.H. REV. STAT. ANN. § 137-J:1(IV) (Supp. 1991); N.Y. PUB. HEALTH LAW § 2980(3) (McKinney Supp. 1991); N.D. CENT. CODE § 23-06.5-02(3) (1991); VT. STAT. ANN. tit. 14, § 3452(3) (1989); W. VA. CODE § 16-30A-3 (Supp. 1990). It has been defined as the ability to "understand the general nature of the health care procedure." GA. CODE ANN. § 31-36-7(1) (Michie Supp. 1990). It has also been defined as the "ability to receive and evaluate information effectively or communicate decisions," OR. REV. STAT. § 127.505(8) (1991); see also WIS. STAT. ANN. § 155.01(8) (West Supp. 1991); or, in an abbreviated form, as the "ability to receive and evaluate information effectively." KAN. STAT. ANN. § 58-629(b) (Supp. 1989); *id.* § 59-3002(a).

²²⁹ Under existing clinical practice, a determination of incapacity typically is made by the attending physician, often informally. "Clinical determinations of incompetence are frequently not overt. They are so routinely made in clinical settings that it strains the meaning of the word 'determination' to characterize them

All of the statutes impose guidelines for making health care decisions, guidelines which are drawn from the evolving case law on the termination of life support.²³⁰ At a minimum, an agent must follow the principal's desires as expressed in the document. The written desires are then supplemented, under a majority of the statutes, by other preferences that the principal may have expressed or that are otherwise made known.²³¹ If a principal's desires concerning a particular course of treatment are unknown, the agent

as such." MEISEL, *supra* note 7, § 8.7, at 212. A number of the statutes merely codify the prevalent clinical practice by requiring that the determination be made by the attending physician. *See, e.g.*, KAN. STAT. ANN. § 58-629(b) (Supp. 1991). Other states have gone much further. Heightened standards that have been enacted include: a requirement that the determination be made by two physicians, OR. REV. STAT. § 127.535(1) (1991); by two physicians, one of whom must be a psychiatrist, D.C. CODE ANN. § 21-2204(a) (1989); or in lieu of two physicians, by a physician and licensed psychologist, W. VA. CODE § 16-30A-3 (Supp. 1990); WIS. STAT. ANN. § 155.05(2) (West Supp. 1991). Other innovations include a requirement that a copy of the determination be sent to the agent, and to the principal, if able to comprehend, N.Y. PUB. HEALTH LAW § 2983(3) (McKinney Supp. 1991); a requirement that a copy of the determination be appended to the power, WIS. STAT. ANN. § 155.05(2) (West Supp. 1990); and a provision that the principal may designate in the power the physician or physicians who are to make the capacity determination. N.C. GEN. STAT. § 32A-20(a) (1991) (statute); *id.* § 32A-25 (form).

²³⁰ For a comprehensive discussion of the judicially created tests, see MEISEL, *supra* note 7, §§ 9.1-35.

²³¹ Preferences might be manifested in other written documents, through oral statements made to the agent or to others and, under some of the statutes, through a consideration of the principal's values and other factors that give hints as to what the principal would have decided. The most commonly enacted standard is that the agent must act consistently with the desires expressed in the power or otherwise made known. CAL. CIV. CODE § 2434(b) (West Supp. 1991); IDAHO CODE § 39-4505 (Supp. 1990); IOWA CODE ANN. § 144B.6(2) (West Supp. 1992); NEV. REV. STAT. ANN. § 449.830 (Michie Supp. 1989); OR. REV. STAT. § 127.535(4) (1991); R.I. GEN. LAWS § 23.4.10-2 (1989); W. VA. CODE § 16-30A-4(b) (Supp. 1990). Alternatively, the agent must make the decision in accordance with the principal's wishes, including religious and moral beliefs. N.H. REV. STAT. ANN. § 137-J:2(II) (Supp. 1991); N.Y. PUB. HEALTH LAW § 2982(2) (McKinney Supp. 1991); N.D. CENT. CODE § 23-06.5-03(2)(a) (1991); TEX. CIV. PRAC. & REM. CODE ANN. § 135.002(e)(1) (West Supp. 1992); VT. STAT. ANN. tit. 14, § 3453(b)(1) (1989). The standard, however, that most accurately describes an agent's function under a durable power for health care is that the agent must make the decision that the principal would have made. *See* KY. REV. STAT. ANN. § 311.978(1) (Michie/Bobbs-Merrill Supp. 1990).

must act in the principal's best interests.²³²

However, for a decision to be informed, the agent must have access to relevant medical information. Nearly all of the statutes expressly grant agents the right to such information, including the rights to receive, to review, and to consent to the disclosure of their principal's medical records and other relevant information.²³³ Access to records, however, is meaningless unless there is an agent

²³² Stating that an agent must act in the principal's best interests is one thing. Actually defining what is meant by that standard is quite another. This difficulty has led one commentator to conclude that the best interests standard "is too vague to be of useful guidance either to surrogates or courts." MEISEL, *supra* note 7, § 9.8, at 265. This lack of precision has not gone unnoticed in the statutory form health care powers. To avoid a search for a single standard of objectivity, several of the statutes give agents a wide degree of latitude in applying the test. An agent is permitted to make the decision in accordance with the agent's assessment of the principal's best interests. N.D. CENT. CODE § 23-06.5-03(2)(b) (1991); TEX. CIV. PRAC. & REM. CODE ANN. § 135.002(e)(2) (West Supp. 1992); VT. STAT. ANN. tit. 14, § 3453(b)(2) (1989). Alternatively, the agent need only follow the agent's good faith belief as to the principal's best interests. D.C. CODE ANN. § 21-2206(c)(2) (1989); OR. REV. STAT. § 127.535(4) (1990). More restrictive is the New Hampshire standard, which requires that the agent's assessment of the principal's best interests be in accordance with accepted medical practice. See N.H. REV. STAT. ANN. § 137-J:2(II) (Supp. 1991).

²³³ The least expansive of the statutes provide that agents may examine their principal's medical records and consent to their disclosure. IOWA CODE ANN. § 144B.7 (West Supp. 1992); NEV. REV. STAT. ANN. § 449.830 (Michie 1991). Several jurisdictions expand the right to examine to include not just medical records but all information relating to proposed health care. CAL. CIV. CODE § 2436 (West Supp. 1992); D.C. CODE ANN. § 21-2206 (1989); N.Y. PUB. HEALTH LAW § 2982(3) (McKinney Supp. 1992); N.C. GEN. STAT. § 32A-25 (1991); OR. REV. STAT. § 127.535(3) (1991); W. VA. CODE § 16-30A-12 (1991). Several also clarify that the information may be either oral or written and relate to either physical or mental health, and that agents are authorized to execute releases and other documents to obtain that information. IDAHO CODE § 39-4505 (Supp. 1992); KAN. STAT. ANN. § 58-629(a)(3) (Supp. 1991); N.H. REV. STAT. ANN. § 137-J:7 (Supp. 1991); N.D. CENT. CODE § 23-06.5-08 (1991); R.I. GEN. LAWS § 23-4.10-2 (1989); TEX. CIV. PRAC. & REM. CODE ANN. § 135.007 (West Supp. 1992); VT. STAT. ANN. tit. 14, § 3458 (1989); WIS. STAT. ANN. § 155.30(3) (West Supp. 1992). Georgia and Illinois, though, eliminate any possibility of health care provider discretion. An agent has the right to examine any records that the agent deems relevant. GA. CODE ANN. § 31-36-7(3) (Michie 1991); ILL. ANN. STAT. ch. 110 1/2, para. 804-7(c) (Smith-Hurd Supp. 1992).

who is both available and willing to act. Several of the statutory forms state that only one agent may be named,²³⁴ and the other forms, with only a couple exceptions, make no provision for the appointment of co-agents.²³⁵ The unavailable agent could, therefore, pose a problem. This potential difficulty is remedied, at least in part, through the concept of the alternate agent. The alternate agent not only succeeds to the predecessor's duties upon the predecessor's death, resignation, or incapacity, but has authority to make a decision when the predecessor is otherwise unavailable or unwilling.²³⁶ A few of the states that enacted statutory forms, however, elected to keep the traditional successor agent.²³⁷

²³⁴ See CAL. CIV. CODE § 2500 (West Supp. 1992); IDAHO CODE § 39-4505 (Supp. 1992); ILL. ANN. STAT. ch. 110½, para. 804-10(a) (Smith-Hurd Supp. 1992); N.D. CENT. CODE § 23-06.5-17 (1991); R.I. GEN. LAWS § 23-4.10-2 (1989). This prohibition is in sharp contrast to the statutory short-forms directed primarily at property matters. None prohibit the appointment of multiple agents, and several facilitate such appointments. See *supra* notes 61-62 and accompanying text. The prohibition against the designation of multiple agents appears to reflect a concern about possible conflicts among the decisionmakers and the possible unavailability of one or more of the designated agents.

²³⁵ The instructions to the Georgia form provide that a principal may name co-agents. GA. CODE ANN. § 31-36-10(a) (Michie 1991). The statutory form in Kentucky specifically mentions the appointment of "surrogate(s)." KY. REV. STAT. ANN. § 311.980 (Michie/Bobbs-Merrill Supp. 1990).

²³⁶ See CAL. CIV. CODE § 2500 (West Supp. 1992) (provides for designation of up to two alternates); D.C. CODE § 21-2207 (1989) (same); IDAHO CODE § 39-4505 (Supp. 1990) (same); NEV. REV. STAT. ANN. § 449.830 (Michie Supp. 1989) (same); N.H. REV. STAT. ANN. § 137-J:15 (Supp. 1991) (one alternate); N.D. CENT. CODE § 23-06.5-17 (1991) (same); R.I. GEN. LAWS § 23-4.10-2 (1989) (two alternates); TEX. CIV. PRAC. & REM. CODE ANN. § 135.016 (West Supp. 1992) (same); WIS. STAT. ANN. § 155.30(3) (West Supp. 1991) (one alternate). New York spells out the theory of the alternate agent, but in its statute and not in its form. The designated alternate may act if the predecessor is incapacitated, unwilling, or unavailable to act. An agent is unavailable to act if the agent cannot be contacted after diligent efforts. Should the original agent later become competent, willing, and available to act, the authority of the alternate agent ceases. See N.Y. PUB. HEALTH LAW §§ 2980(13), 2981(6) (McKinney Supp. 1992). Iowa and Oregon also authorize the appointment of alternate agents in their statutes and not in their forms. See IOWA CODE ANN. § 144B.5(4) (West Supp. 1992); OR. REV. STAT. § 127.510(1) (1991).

²³⁷ See GA. CODE ANN. § 31-36-10(a) (Michie 1991) (two successors); ILL. ANN. STAT. ch. 110½, para. 804-10(a) (Smith-Hurd Supp. 1992) (same); N.C. GEN. STAT. § 32A-25 (1991) (same); W. VA. CODE § 16-30A-18 (1991) (one successor).

Although the statutes are primarily directed at facilitating care for the principal while the principal is alive, several authorize agents to make decisions after their principal's death. Unless that portion of the form is deleted, the agent may authorize organ donations, an autopsy, and disposition of the remains.²³⁸ Besides their practical benefit, these provisions modify the law of agency. The durable power statutes not only reverse the common-law rule that a power terminates upon incapacity, but they also reverse the rule that a power terminates at death.²³⁹

5. Terminating Life-Support

One of the asserted benefits of the durable power for health care is that it avoids many of the restrictions found in the living will statutes. Through the use of a durable power, one no longer need worry about complex definitions of the categories of patients for whom life-sustaining treatment may be withheld or withdrawn, nor about prohibitions against withholding or withdrawing certain forms of treatment. Although held to a standard of care, the agent may act for the principal regardless of the nature of the principal's condition

²³⁸ Several jurisdictions authorize all three. See CAL. CIV. CODE § 2434(b) (West Supp. 1991) (statute); *id.* § 2500 (form); GA. CODE ANN. § 31-36-7(4) (Michie 1991) (statute); *id.* § 31-36-10(a) (form); ILL. ANN. STAT. ch. 110 1/2, para. 804-7(d) (Smith-Hurd Supp. 1992) (statute); *id.* para. 804-10(a) (form); KAN. STAT. ANN. § 58-629(a)(1) (Supp. 1991) (statute); *id.* § 58-632 (form); N.C. GEN. STAT. § 32A-19(b) (1991) (statute); *id.* § 32A-25 (form). Two limit the authority to the donation of organs. IDAHO CODE § 39-4505 (Supp. 1992); W. VA. CODE § 16-30A-4(d)(7) (1991). Procedures for implementation of this authority are not necessarily contained in the durable power statutes. A state's version of the Uniform Anatomical Gift Act and a state's provisions on autopsy and consent to burial should also be consulted. Illinois, for example, has made conforming amendments to its provisions on autopsy and to its version of the Uniform Anatomical Gift Act. ILL. ANN. STAT. ch. 31, para. 42 (Smith-Hurd Supp. 1990) (autopsy); *id.* ch. 110½, para. 303 (anatomical gifts).

²³⁹ See RESTATEMENT (SECOND) OF AGENCY § 120 (1957); *supra* notes 12-13 and accompanying text.

or the type of treatment in question.²⁴⁰

A majority of the statutory form health care powers contain this level of flexibility. The statutory form health care powers have generally steered clear of restrictive definitions of the classes of patients from whom treatment may be withdrawn, restrictions that have virtually nullified many living will statutes.²⁴¹ In addition, in accordance with the weight of judicial and medical opinion, a majority of statutory form health care powers neither prohibit nor impose heightened standards of proof on decisions to withdraw or withhold artificial nutrition and hydration.²⁴² Furthermore, a

²⁴⁰ Leading commentators who have lamented the limitations of the living will but have praised the durable power for health care include Areen, *supra* note 115, at 230; Collin, *supra* note 117, ¶ 504.3; Lombard, *supra* note 191, at 24-30; and MEISEL, *supra* note 7, § 10.12, at 332. None of these commentators, however, focused on the detailed requirements of recent statutory form enactments.

²⁴¹ Professor Gelfand noted that every living will act requires that the patient's prognosis be "terminal" or the like. See Gelfand, *supra* note 138, at 740 & n.8. The key, of course, is how "terminal" is defined. In at least 19 of the living will statutes, the definition requires that death will occur shortly even if life-sustaining treatment is provided. *Id.* at 741 n.9. This restriction has led one court to state:

While other states do have statutes which define imminent death under conditions where all medical treatment is continued, such a definition effectively renders the statute useless. If death is truly imminent even with the continuation of life-prolonging procedures, there is no need to create a judicial or quasi-judicial procedure for their withdrawal.

In re Guardianship of Browning, 543 So. 2d 258, 265 (Fla. Dist. Ct. App. 1989) (footnote omitted), *aff'd*, 568 So. 2d 4 (Fla. 1990).

²⁴² The courts have generally refused to draw a distinction between artificial nutrition and hydration and other forms of medical treatment. The principal exception is *Cruzan v. Harmon*, 760 S.W.2d 408, 423 (Mo. 1988) ("And common sense tells us that food and water do not treat an illness, they maintain a life."), *aff'd sub nom.*, *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841 (1990). The American Medical Association has also refused to find a distinction. See COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS OF THE AMERICAN MEDICAL ASSOCIATION, CURRENT OPINIONS, Op. 2.20 (1989) ("Life-prolonging medical treatment includes medication and artificially or technologically supplied respiration, nutrition or hydration."). As with all matters of public import, however, there are dissenting voices, including that of the former Surgeon General. See C. Everett Koop, *Decisions at the End of Life*, 5 ISSUES L. & MED. 225, 230 (1989) ("It is reasonable to say that we are not being told [by the AMA] to let the terminal patient whose death is imminent go

majority of the statutory forms do a fair job of assisting principals to spell out special wishes, if a principal is so inclined. The principal is warned that the authority of the agent extends to withholding or withdrawing life support unless the principal chooses to modify the form in spaces provided.²⁴³ Moreover, several of the forms contain a convenient check-the-box method for deciding different levels of care.²⁴⁴

A minority of the statutes, however, include restrictions patterned after the living will statutes. Some of the restrictions relate to the withholding or withdrawing of all forms of life-sustaining treatment. Oregon requires that the condition be one that will produce death whether or not life-sustaining treatment is withdrawn,²⁴⁵ and West Virginia requires that continued treatment offer

quickly. We are starving him to death.").

²⁴³ See, e.g., CAL. CIV. CODE § 2500 (West Supp. 1992) ("You should consider whether you want to include a statement of your desires concerning life-prolonging care, treatment, services, and procedures."); ILL. ANN. STAT. ch. 110 1/2, para. 804-10(a) (Smith-Hurd Supp. 1992) ("The above grant of power is intended to be as broad as possible so that your agent will have authority to make any decision you could make to obtain or terminate any type of health care, including withdrawal of food and water and other life-sustaining measures. . . ."); NEV. REV. STAT. § 449.830 (Michie 1991) ("Except as you otherwise specify in this document, the power of the person you designate to make health care decisions for you may include the power to consent to your doctor not giving treatment or stopping treatment which would keep you alive."); VT. STAT. ANN. tit. 14, § 3466 (1989) ("Here you may include any specific desires or limitations you deem appropriate, such as when or what life-sustaining measures should be withheld. . . .").

²⁴⁴ The menu of options includes directions that treatment be withheld or withdrawn if the agent believes that the burdens of treatment outweigh the expected benefits, GA. CODE ANN. § 31-36-10(a) (Michie 1991); ILL. ANN. STAT. ch. 110 1/2, para. 804-10(a) (Smith-Hurd Supp. 1992); that treatment be withdrawn if there is no reasonable prospect that the principal will regain the ability to act and think, VT. STAT. ANN. tit. 14, § 3466 (1989); that artificial nutrition and hydration be provided in all events, *id.*; and that life-sustaining treatment be provided in all events, NEV. REV. STAT. ANN. § 449.830 (Michie Supp. 1989).

²⁴⁵ Oregon requires that the condition be incurable, that the condition would, within reasonable medical judgment, produce death regardless of whether life-prolonging procedures are applied, and that life-prolonging procedures would serve only to postpone the moment of death. OR. REV. STAT. § 127.505(12) (1991).

no hope of medical benefit.²⁴⁶ Restrictions have also been placed on withholding or withdrawing artificial nutrition and hydration. Kentucky requires the administration of artificial nutrition and hydration unless the principal's death will occur within a few days.²⁴⁷

Furthermore, a number of the statutes require that principals specify their wishes regarding withdrawal of treatment. New York prohibits agents from authorizing the withholding or withdrawal of artificial nutrition unless the principal's wishes are reasonably known.²⁴⁸ New Hampshire and Wisconsin prohibit agents from withholding or withdrawing artificial nutrition and hydration unless the power so authorizes.²⁴⁹ Oregon places severe limitations on an agent's authority to withhold or withdraw life-sustaining treatment in general, and artificial nutrition and hydration in particular, unless the principal checks the appropriate spaces on the statutory form.²⁵⁰

²⁴⁶ See W. VA. CODE § 16-30A-4(d)(6) (1991) (also requiring that two physicians certify the principal's condition).

²⁴⁷ KY. REV. STAT. ANN. § 311.978(3) (Michie/Bobbs-Merrill 1990). Withdrawal is otherwise permitted if physical assimilation is impossible or if the burdens of providing artificial nutrition and hydration outweigh its benefits. However, in making an assessment the agent may not consider the quality of the principal's continued life.

²⁴⁸ N.Y. PUB. HEALTH LAW § 2982(2) (McKinney Supp. 1992).

²⁴⁹ N.H. REV. STAT. ANN. § 137-J:3(III) (Supp. 1991) (statute); *id.* § 137-J:15 (form); WIS. STAT. ANN. § 155.20(4) (West Supp. 1991) (statute); *id.* § 155.30(3) (form).

²⁵⁰ Oregon's mandatory statutory form provides:

I direct that my attorney-in-fact have authority to make decisions regarding the following: ___ Withholding or withdrawal of life-sustaining procedures with the understanding that death may result. ___ Withholding or withdrawal of artificially administered hydration or nutrition or both with the understanding that dehydration, malnutrition and death may result.

OR. REV. STAT. ANN. § 127.530 (1991). If a principal fails to check the line authorizing the withdrawal of life-sustaining procedures, the agent may authorize the withholding or withdrawal only if the principal is diagnosed as being irreversibly comatose and the diagnosis is confirmed by the health facility's prognosis committee. *Id.* § 127.540(6). If a principal fails to check the line authorizing the withdrawal of artificial hydration or nutrition, the agent may authorize the withholding or withdrawal only if (a) the principal clearly and specifically stated, prior to incapacity,

Finally, pregnant principals have not gone unnoticed. Wisconsin prohibits an agent from making health care decisions for a pregnant principal except as expressly authorized in the power.²⁵¹ Kentucky and New Hampshire prohibit withdrawal if there is a possibility that the fetus could attain viability.²⁵²

Because the other statutory form enactments do not contain living will restrictions does not necessarily mean that a principal is free of those restrictions. A principal who has executed a living will may, by that document, bind an agent under a health care power to limitations on the withdrawal of life-sustaining treatment found in the living will and in the governing living will statute. Only four of the statutory form health care enactments provide that a durable power automatically supersedes a living will.²⁵³ Six others provide that a power only supersedes a living will to the extent that the documents conflict,²⁵⁴ and the remainder are silent, preferring perhaps to let

that he or she would refuse artificial nutrition and hydration, (b) the principal is in the final stage of a terminal illness and death will occur within a reasonably short time whether or not such treatment is withheld or withdrawn, or (c) the administration of such treatment is not medically feasible or would cause severe, intractable, or long-lasting pain. *Id.* § 127.580(1).

²⁵¹ See WIS. STAT. ANN. § 155.20(6) (West Supp. 1991) (statute); *id.* § 155.30(3) (form).

²⁵² KY. REV. STAT. ANN. § 311.978(4) (Michie/Bobbs-Merrill Supp. 1990); N.H. REV. STAT. ANN. § 137-J:2(V)(c) (Supp. 1991). For a comparable general durable power provision, see S.D. CODIFIED LAWS ANN. § 59-7-2.8 (Supp. 1992). Pregnancy limitations are a common feature of living will statutes. See Gelfand, *supra* note 138, at 778-79 & nn.169-70 (listing 27 statutes). They may also be unconstitutional. See Janice MacAvoy-Snitzer, Note, *Pregnancy Clauses in Living Will Statutes*, 87 COLUM. L. REV. 1280 (1987).

²⁵³ Oregon provides that a later executed power supersedes an earlier executed living will directive. OR. REV. STAT. § 127.545(4)(a) (1991). Georgia and Illinois provide instead that the living will is inoperative as long as an agent is available to deal with life-sustaining or death-delaying procedures. GA. CODE ANN. § 31-36-11 (Michie 1991); ILL. ANN. STAT. ch. 110 1/2, para. 804-11 (Smith-Hurd Supp. 1992). Iowa provides that a living will does not restrict the authority of the agent unless the living will or durable power of attorney for health care expressly provides otherwise. IOWA CODE ANN. § 144B.6(2) (West Supp. 1992).

²⁵⁴ North Dakota, Texas, Vermont, and West Virginia provide that the provisions of the document executed later in time control. N.D. CENT. CODE § 23-06.5-13(2) (1991); TEX. CIV. PRAC. & REM. CODE ANN. § 135.012 (West Supp.

the courts resolve this battle of the forms.

6. *The Nonconforming Power*

There are strong arguments for many of the heightened requirements found in the statutory form health care power enactments. Witnessing or acknowledgement may enhance the document's reliability and the principal's seriousness of purpose.²⁵⁵ Detailed rules on witness and agent eligibility may guard against a perceived risk of undue influence or conflict of interest.²⁵⁶ The requirement that a person clearly express his or her preferences may reduce the risk of unintentional death.²⁵⁷

Even the insistence on mandatory forms may offer a benefit. A health care provider will know that the form of power enjoys official legislative backing, thereby reducing the need for an independent investigation of the power's validity or, perhaps, an inclination to simply refuse the power.²⁵⁸ Yet, these detailed regulatory schemes may exact a terrible price. The greater the degree of regulation, the greater is the risk that a principal's power will fail to conform to the statutory requirements. This problem is most serious for principals whose previously executed power does not meet the execution and form requirements of a new home state or a state in which the principal is present solely to receive treatment. Furthermore, stationary clients may not read and follow the detailed execution

1992); VT. STAT. ANN. tit. 14, § 3463(b) (1989); W. VA. CODE § 16-30A-4(d)(8) (1991). New Hampshire and Wisconsin provide that the provisions of the durable power control. N.H. REV. STAT. ANN. § 137-J:12(II) (Supp. 1991); WIS. STAT. ANN. § 155.70(3) (West Supp. 1992).

²⁵⁵ For the witnessing and acknowledgement requirements, see *supra* notes 139-42 and accompanying text.

²⁵⁶ For the witness eligibility rules, see *supra* notes 144-58 and accompanying text. For the agent eligibility rules, see *supra* notes 203-09 and accompanying text.

²⁵⁷ For a discussion of those requirements, see *supra* notes 248-51 and accompanying text.

²⁵⁸ For a discussion of the mandatory and substantially equivalent form requirements, see *supra* notes 160-63 and accompanying text.

requirements, or, where required, use the right form,²⁵⁹ a near certainty among those who executed powers before the prescribed form's enactment.

The choice of law rules are the starting point in determining the validity of a power executed elsewhere. Under the modern approach to conflicts, the law of the jurisdiction with the most significant relationship to the principal applies.²⁶⁰ Under this approach, the validity of a power is not necessarily governed by the law of the state in which it was executed.²⁶¹ Moreover, given the important public policy concerns, the law of the state where the power is implemented probably will control the agent's dealings with health care providers and other third parties.²⁶² An obvious solution to the conflict of

²⁵⁹ If this author's experience is representative, defective forms are frequent. Every client-prepared living will form which this author reviewed while in private practice was defectively executed. The client either failed to use the prescribed statutory form or failed to obtain the signatures of the requisite number of witnesses.

²⁶⁰ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1969). Among the factors to be considered in determining which relationship is most significant are the policies of the particular field of law, the protection of justified expectations, and certainty, predictability, and uniformity of result.

²⁶¹ Under the traditional territorialist approach to conflicts, the rule that contract formalities were governed by the state of execution was ironclad. See RESTATEMENT OF CONFLICT OF LAWS § 334 (1934). The modern approach backtracks a bit. The formalities of the state of execution are now only usually accepted. The courts may apply the law of the place of performance if the formalities are embodied in special regulatory legislation that is designed for the protection of the parties, an exception that seems to fit statutory form health care powers. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 199(2) & cmt. c (1969).

²⁶² There are several routes by which this conclusion may be reached. First, although the state of execution might control the formalities of execution, the place of performance will usually control the agent's rights and duties. See RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 291 cmt. f (1969). Second, under both the traditional and modern approaches to conflicts, the law of the place of performance will determine the details of performance and the legality of an agent's acts. See RESTATEMENT OF CONFLICT OF LAWS §§ 360-361 (1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 202, 206 (1969). Finally, the jurisdiction in which the acts are performed usually will apply its own law if important questions of public policy are at stake. See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 81-85 (3d ed. 1986).

laws dilemma is to provide a clear statutory rule, at least for determining the validity of execution. A majority of the statutes, however, do not address the validity of out-of-state powers. Nevertheless, several statutes provide that a power is validly executed if it complies with the requirements of the place of execution,²⁶³ or, in the alternative, with the law of the principal's residence at the time of execution.²⁶⁴

Principals who executed powers before the statutory form was enacted may also be out of luck. Surprisingly, only slightly over half of the jurisdictions validate pre-enactment powers.²⁶⁵ In contrast, the District of Columbia explicitly imposes its current execution requirements and other jurisdictions may have done so through

²⁶³ D.C. CODE ANN. § 21-2202(3)(A) (1989); IOWA CODE ANN. § 144B.3(4) (West Supp. 1992); N.H. REV. STAT. ANN. § 137-J:10 (Supp. 1991); N.Y. PUB. HEALTH LAW § 2990 (McKinney Supp. 1992); N.D. CENT. CODE § 23-06.5-11 (1991); TEX. CIV. PRAC. & REM. CODE ANN. § 135.013 (West Supp. 1992); VT. STAT. ANN. tit. 14, § 3461 (1989); W. VA. CODE § 16-30A-17 (1991).

²⁶⁴ KAN. STAT. ANN. § 58-630 (Supp. 1991). A better solution is to validate a power that complies with the law of either the place where executed or the principal's domicile. Such a dual approach is typical in wills statutes. *See, e.g.*, UNIF. PROBATE CODE § 2-506, 8 U.L.A. 116 (1983).

²⁶⁵ *See* CAL. CIV. CODE § 2431(b) & Legislative Comm. cmt. (West Supp. 1992) (current execution requirements waived); GA. CODE ANN. § 31-36-12 (Michie 1991) (pre-enactment health care agencies not affected or invalidated); ILL. ANN. STAT. ch. 110½, para. 804-12 (Smith-Hurd Supp. 1992) (same); IOWA CODE ANN. § 144B.2 (West Supp. 1992) (pre-enactment power valid if signed by principal); KAN. STAT. ANN. § 58-631 (Supp. 1991) (pre-enactment powers not limited or otherwise affected); KY. REV. STAT. ANN. § 311.974(2) (Michie/Bobbs-Merrill Supp. 1990) (valid designation of agent may be made in pre-enactment durable power); N.C. GEN. STAT. § 32A-19(e) (1991) (act not to be construed to invalidate pre-enactment powers); N.D. CENT. CODE § 23-06.5-15 (1991) (chapter does not affect validity or enforceability of pre-enactment powers); Act effective July 19, 1991, ch. 146, § 3, 1991 N.H. Laws 196, 204 (uncodified) (pre-enactment health care powers not affected); N.Y. PUB. HEALTH LAW § 2981(5)(e) (McKinney Supp. 1992) (pre-enactment delegations not invalidated); W. VA. CODE § 16-30A-15(a) (1991) (pre-enactment powers recognized); WIS. STAT. ANN. § 155.70(4)(a) (West Supp. 1991) (chapter not to be construed to invalidate pre-enactment powers).

inaction.²⁶⁶

The diversity among the states calls for creative lawyering. The attorney should attempt, to the extent feasible, to draft a power of attorney with the laws of all states in mind. The attorney should draft a power with specificity, including, most importantly, a statement of desires as to the withholding or withdrawal of artificial nutrition and hydration.²⁶⁷ Furthermore, it would be advisable for principals to reconfirm their powers periodically²⁶⁸ and to prepare dated memoranda of their thoughts and feelings,²⁶⁹ particularly after the onset of a terminal condition.²⁷⁰ Finally, the drafter

²⁶⁶ D.C. CODE ANN. § 21-2205(e) (1989). Professor Gelfand, in discussing the many living will statutes that fail to deal with pre-enactment documents, also concludes that pre-enactment documents must conform to current execution requirements. Gelfand, *supra* note 138, at 782.

²⁶⁷ For a discussion of the current restrictions on the withdrawing or withholding of artificial nutrition and hydration, see *supra* notes 247-50 and accompanying text.

²⁶⁸ Periodic reconfirmation will enhance the power's acceptability. Although no comprehensive "staleness" doctrine for health care powers has evolved, the courts prefer the recent expressions of desires. See, e.g., John F. Kennedy Memorial Hosp. v. Bludworth, 432 So. 2d 611, 620 (Fla. Dist. Ct. App. 1983) (weight to be accorded to living will should take into account the "timeliness of its execution"), *rev'd on other grounds*, 452 So. 2d 921 (Fla. 1984); *In re Westchester County Medical Center ex rel. O'Connor*, 531 N.E.2d 607, 613 (N.Y. 1988) ("[T]here always exists the possibility that, despite his or her clear expressions in the past, the patient has since changed his or her mind."). Furthermore, periodic reconfirmation is a necessity in Oregon. See *supra* note 165.

²⁶⁹ Although including a personal statement in the power and arranging for periodic updating is best, repeated re-execution of the power might be impractical. A side letter kept with the power may be just as effective. An agent is not only required to follow the express wishes as stated in the power but also must follow desires otherwise made known. See *supra* note 231 and accompanying text. As might be expected, courts prefer the written expression of desires. "The ideal situation is one in which the patient's wishes were expressed in some form of a writing." *O'Connor*, 531 N.E.2d at 613. Perhaps as a response to *O'Connor*, New York has explicitly endorsed the use of written memoranda to supplement a power. See N.Y. PUB. HEALTH LAW § 2985(1)(d) (McKinney Supp. 1992).

²⁷⁰ To meet the express wishes standard, one must show that the patient "held a firm and settled commitment to the termination of life supports under the circumstances like those presented." *O'Connor*, 531 N.E.2d at 613. Patients who have met this standard generally have made their statements while terminally

should identify the most stringent of the execution requirements and should incorporate them into the power.²⁷¹

VI. CONCLUSION

Until about ten years ago, little was written about durable powers because little could be said. The concept of the durable power was relatively recent and the statutes in force were simple affairs that merely authorized the use of the durable power device without heavily regulating its use. Within the past decade this has changed. The general durable power statutes are beginning to fragment, and new varieties of powers, the statutory short-form, the durable power bank account, and the health care power, have been enacted in numerous jurisdiction.

All is not chaos, however. Although it has retained its agency moorings, the durable power is no longer exclusively the creature of the law of agency. Borrowing from other areas of the law is common. These borrowed concepts have not been applied indiscriminately to all aspects of durable powers. They have instead been applied selectively to particular problems at hand. The general durable power statutes are beginning to borrow heavily from the law of trusts²⁷² and guardianship.²⁷³ The statutory health care forms were preceded by the living will statutes. The durable power bank

afflicted. See *Couture v. Couture*, 549 N.E.2d 571, 576 (Ohio Ct. App. 1989); *Leach v. Akron Medical Center*, 426 N.E.2d 809, 811 (Ohio Ct. C.P. 1980). Statements made without such a clear focus generally have been held insufficient. See *Cruzan v. Harmon*, 760 S.W.2d 408, 411, 424 (Mo. 1988), *aff'd sub nom. Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841 (1990); *O'Connor*, 531 N.E.2d at 614-15; *In re Jobes*, 529 A.2d 434, 442-43 (N.J. 1987). But see *In re Gardner*, 534 A.2d 947, 952-54 (Me. 1987).

²⁷¹ For a form that attempts to satisfy the execution requirements of all jurisdictions, see ABA COMM'N ON LEGAL PROBLEMS OF THE ELDERLY, *supra* note 168.

²⁷² The most notable example is the Durable Power of Attorney Law of Missouri. For a discussion of this statute, see *supra* notes 39-50 and accompanying text.

²⁷³ See *supra* note 40 and accompanying text.

account is part and parcel of the law on multiple-party bank accounts.

The statutory short-form does not owe its existence to other areas of the law. It is a product of a well-intentioned desire to satisfy a perceived need for readily available forms,²⁷⁴ a desire that also contributed to the enactment of the statutory form health care powers. Unlike the statutory short-form, for which a general durable power may be substituted, many of the health care forms are a take-it-or-leave-it proposition. The prescribed forms, ritual execution requirements, and restrictions on withdrawing or withholding life-sustaining treatment may be based on well-reasoned considerations of policy.²⁷⁵ However, this misplaced desire to protect principals has made powers more difficult to implement and has discouraged the use of the very tool that offered the best hope for protection.

²⁷⁴ For a discussion of the asserted benefits of the statutory short-form, see *supra* notes 59-60 and accompanying text.

²⁷⁵ For a brief summary of some of these arguments, see *supra* text accompanying notes 255-58.

